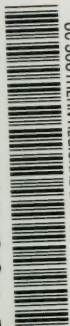


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BY

WILLIAM A. SUTHERLAND

OF THE CALIFORNIA BAR

IN FOUR VOLUMES

VOL. IV.

SAN FRANCISCO:

BANCROFT-WHITNEY COMPANY,

LAW PUBLISHERS AND LAW BOOKSELLERS.

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CHAPTER CXXXV.

CONTRACTS FOR SALE OF REAL PROPERTY.

§ 5713. **Allegation of possession.**—An allegation in a complaint that the plaintiff “assumed to and did exercise acts of control over and possession of portions” of a tract of land, is not equivalent to an averment that the plaintiff had actual possession of the tract of land, or any part of it.¹ A mere option of itself does not give right of possession.²

§ 5714. **Allegation of seisin in fee.**—An allegation that the plaintiff “is the owner” of the land sued for, is in substance an allegation of seisin in fee, in “ordinary” instead of in technical language.³ An allegation that the plaintiff was the owner of certain property at the date he contracted to sell it to the defendants is immaterial, if he was the owner and able to make delivery thereof when the time for performance arrived.⁴

§ 5715. **Contract in the alternative.**—When a contract is in the alternative, as to pay the purchase price or reconvey the property on a day named, the party who is to perform must make his election on the day named, and, if he does not, he loses his right of election. He cannot wait till the next day.⁵

§ 5716. **Demand and refusal.**—It has been held to be necessary either to tender a deed for signature or to wait a reasonable time for its preparation by the vendor, and make a second demand.⁶ A tender of a deed insufficient to convey the title agreed to be conveyed is a refusal of the offer of the vendee to perform.⁷ But if the vendor, on the first demand, positively

¹ Brennan v. Ford, 46 Cal. 7.

² Frank v. Stratford-Hancock, 13 Wyo. 37, 110 Am. St. Rep. 963, 77 Pac. 134, 67 L. R. A. 571.

³ Garwood v. Hastings, 38 Cal. 216.

⁴ Kleeb v. Bard, 7 Wash. 41, 34 Pac. 138.

⁵ Rewrick v. Goldstone, 48 Cal. 554.

⁶ Lutweller v. Linnell, 12 Barb. 512; Hackett v. Huson, 3 Wend. 250;

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Fuller v. Hubbard, 6 Cow. 17, 16 Am. Dec. 423. See, however, Pearsoll v. Frazer, 14 Barb. 564, where it is asserted that the above rule is a rule of evidence merely, and need not be set forth specially. As to cases in which a demand is necessary, see Bruce v. Tilson, 25 N. Y. 194.

⁷ Latimer v. Capay Valley Land Co., 137 Cal. 286, 70 Pac. 82.

refuses to convey, nothing more need be done;⁸ or if the forfeiture clause has been waived by the vendor, the vendee could not be placed in default for the non-payment of installments until after demand and the lapse of reasonable time.⁹ An averment of demand and tender is necessary.¹⁰

§ 5717. **Description of property.**—He who sells property on a description given by himself is bound in equity to make good that description; and if it be erroneous in a material point, although the variance be occasioned by mistake, he must still remain liable for that variance.¹¹ Where the property intended is evident, the contract may be enforced, and the part of the description omitted may be supplied.¹² An incomplete description may be aided by extrinsic parol evidence to apply it to the subject-matter, provided the land can be thereby identified, and a new description is not introduced into the contract. But the complaint must aver the necessary extrinsic matter, to show, in connection with the description, what particular land was intended; and it is not sufficient in an action for damages for non-performance of the contract to allege that by an imperfect description contained in the contract the parties intended to convey certain property, nor can such contract be received in evidence under such an averment.¹³ A contract describing the land as one quarter-interest in one thousand seven hundred acres, covering the greater portions of sections 21, 28, and 33, in township 13 south, range 23 east, in Fresno county, California, is not void for reason of uncertainty.¹⁴

§ 5718. **Interpretation of contract.**—In Iowa, the law will construe a contract to be a mortgage, rather than a conditional sale; still the intention of the parties to the contract is the true test.¹⁵ In California, a contract is, in effect, the same as a mortgage.^{15a} The vendee is deemed the owner of the land in equity, and the

⁸ Carpenter v. Brown, 6 Barb. 147; Driggs v. Dwight, 17 Wend. 74, 31 Am. Dec. 283.

⁹ Whiting v. Doughton, 31 Wash. 327, 71 Pac. 1026.

¹⁰ Beecher v. Conradt, 13 N. Y. 110, 64 Am. Dec. 535; Lester v. Jewett, 11 N. Y. 453.

¹¹ McFerran v. Taylor, 3 Cranch, 270, 2 L. Ed. 436.

¹² In re Garnier's Estate, 147 Cal. 457, 82 Pac. 68.

¹³ Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386.

¹⁴ Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

¹⁵ Hughes v. Sheag, 19 Iowa, 335.

^{15a} Cal. Civ. Code, § 2924.

vendor to have a lien thereon for the purchase money; but such relation is recognized only in equity.¹⁶

§ 5719. **Performance of conditions.**—Where A. sold a lot of land to B., and delivered possession, and in a written contract respecting the same it was stipulated, among other things, that in the event that B. should be dispossessed by legal judgment at any time within three years A. should pay back to B. two thousand dollars, and should suit be brought against B. for the lot, then B. should notify A. of it, in order to enable him to assist in the defense of the title, it was held that the giving of the notice by B. to A. of the institution of suit against B. for the lot was indispensable to enable B. to recover of A. on such contract. In a suit on such contract, B. should aver that he had been evicted after notice to A. The payment of the money is dependent on this fact.¹⁷

§ 5720. **Sale "in writing."**—The party making an allegation in a pleading that the sale of a mining claim, under which he claims title, was in writing is not thereby precluded from proving that the sale was a verbal one.¹⁸

§ 5721. **Writing, presumption of.**—If a complaint avers that a contract was made for the sale of real estate, the presumption is that it was in writing. A finding of fact in such case need not state that the contract was in writing.¹⁹

§ 5722. **Admission.**—In *assumpsit* for the value of land conveyed by plaintiff to defendant, in consideration of an oral promise by the latter to convey other land worth two thousand dollars to the plaintiff, which promise defendant now refuses to perform, it was held that defendant's agreement, and the value of the land to have been conveyed to him, might be proved as an admission of the value of the land which he received.²⁰

§ 5723. **Rescission of contract.**—In order to rescind a contract for the sale of land, on the ground that the vendor cannot per-

¹⁶ Flanagan's Estate v. Great Central Land Co., 45 Or. 335, 77 Pac. 485.

¹⁷ Bensley v. Atwill, 12 Cal. 231.

¹⁸ Patterson v. Keystone Min. Co., 30 Cal. 360.

¹⁹ McDonald v. Mission View Homestead Assoc., 51 Cal. 210.

²⁰ Basset v. Basset, 55 Me. 127.

form it, having no title, it is necessary to aver and show an outstanding title in another.²¹ To entitle the plaintiff to recover in such action, he must allege and prove that he has performed all the conditions on his part to be performed, and that the defendant is in default as to the conditions to be performed by him.²² Where a decree requires a reconveyance of property to the plaintiff on payment by him of a certain amount, such payment becomes a condition precedent to the maintenance of an action to enforce the conveyance, and a complaint which fails to allege it does not state a cause of action.²³

§ 5724. **Title.**—If the true owner conveys the property by any name, the conveyance as between the grantor and grantee will transfer the title.²⁴ If the contract was fraudulent, the vendee in possession may deny vendor's title;²⁵ but ordinarily a purchaser cannot dispute his vendor's title, nor purchase and assert against him an adverse title.²⁶

A refusal before the time specified, if relied on as an excuse for non-performance, must be alleged to have been addressed to the party alleging.²⁷

§ 5725. **Incumbrances and liens.**—A building restriction is an incumbrance upon the title, even though the covenant does not run with the land; for equity might enforce it.²⁸ Where the lessee receives the fee title, the two estates are merged, and the lease is no more an incumbrance.²⁹ A vendor impliedly agrees to furnish a good title, which is not done where part of the land, however small, has been sold for taxes, and there is an unsatisfied mortgage on it, though it is probably barred, it requiring litigation to remove it.³⁰ Delinquent water taxes are not a lien upon city lots, in the absence of a statute authorizing the same.³¹

21 Riddell v. Blake, 4 Cal. 264.

22 Dennis v. Strassburger, 89 Cal. 583, 26 Pac. 1070.

23 Manaudas v. Heilner, 29 Or. 222, 45 Pac. 758.

24 Fallon v. Kehoe, 38 Cal. 44, 99 Am. Dec. 347; citing Middleton v. Findla, 25 Cal. 80. To same effect is David v. Williamsburg etc. Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418.

25 Phenix v. Bjelich (Nev.), 95 Pac. 331.

26 Butterfield v. Nogales Copper Co. (Ariz.), 95 Pac. 182.

27 Traver v. Halstead, 23 Wend. 66.

28 Whelan v. Rossiter, 1 Cal. App. 701, 82 Pac. 1082.

29 Swanston v. Clark, 153 Cal. 300 95 Pac. 1117.

30 Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726.

31 Linne v. Bredes, 43 Wash. 540 117 Am. St. Rep. 1068, 86 Pac. 858, 6 L. R. A. (N. S.) 707.

The eaves of an adjoining property projecting over the land is an incumbrance.³³

§ 5726. **Marketable title.**—A vendee is not required to accept a title depending on matters resting in parol; nor is a title marketable where the chain of title of record can, by parol, be proved to be erroneous.³⁴ A perfect title is one fairly deducible of record, and free from reasonable doubt and litigation.³⁵

§ 5727. **Consideration, in purchase of land.**—A promise or agreement to convey lands in consideration of the purchaser's paying for them out of the profits is void, as having no consideration.³⁶ A promise made under mistake, as to liability, is void.³⁷

In a case in California, defendant, upon the purchase of certain land from B., agreed with him in writing, as part of the consideration, to pay to plaintiff a debt then due the latter from B. Plaintiff afterwards assented to the arrangement, and verbally agreed with the defendant to look to him for his debt, and release B. It was held that this agreement was not within the statute of frauds, and gave plaintiff a right of action against defendant for the debt.³⁸

§ 5728. **Consideration of deed.**—In New York, an action will lie for the consideration of a deed, although there was no valid contract under the statute of frauds,³⁹ even when the deed contains a receipt for the consideration.⁴⁰

§ 5729. **Delivery.**—Under a verbal contract of sale of real estate, the delivery of the title-deeds is equivalent to a symbolical delivery of and admission into the possession of the property, as between vendor and vendee.⁴¹

§ 5730. **Rights of vendee.**—When the property has been resold, the surplus beyond the purchase money due belongs to the

³³ *Walters v. Mitchell*, 6 Cal. App. 410, 92 Pac. 315.

³⁴ *Id.*

³⁵ *Whelan v. Rossiter*, 1 Cal. App. 701, 82 Pac. 1082.

³⁶ *Dorsey v. Packwood*, 12 How. 126, 13 L. Ed. 921.

³⁷ *Offutt v. Parrott*, 1 Cranch C. C. 154, Fed. Cas. No. 10453.

³⁸ *McLaren v. Hutchinson*, 22 Cal.

188, 83 Am. Dec. 59. Whether the assent was necessary to fix defendant's liability, see *Lewis v. Covillaud*, 21 Cal. 178.

³⁹ *Thomas v. Dickinson*, 12 N. Y. 364.

⁴⁰ *Shephard v. Little*, 14 Johns. 210; *Thomas v. Dickinson*, 12 N. Y. 364.

⁴¹ *Tohler v. Folsom*, 1 Cal. 207, and note.

vendee.⁴² A failure on the part of the vendee to pay the purchase money for two years and more does not forfeit his right under the contract, as the vendor may enforce the payment at any time after it is due.⁴³

§ 5731. "Execute."—"Execute" implies delivery.⁴⁴ It also implies subscription.⁴⁵ An allegation of readiness and willingness is necessary.⁴⁶ Acting upon the contract is equivalent to signing it.⁴⁷

§ 5732. **Payment and delivery—Mutual agreements.**—As a general rule, where a written contract for the sale and conveyance of real property provides that the deed shall be delivered at the time of making the first payment, the agreement to pay and the agreement to deliver are mutual and dependent agreements, and performance, or an offer to perform, by the purchaser is necessary to make it incumbent upon the seller to deliver the deed.⁴⁸ An averment that the purchaser is ready and willing to accept the property, and make payment therefor according to the contract, is not, under ordinary circumstances, equivalent to an averment of payment, or of an offer to pay.⁴⁹ The vendor cannot maintain an action on a note and mortgage given by the vendee as part payment of the purchase price without first tendering the deed.⁵⁰

§ 5733. **Sufficiency of complaint—Judgment on pleadings.**—The complaint should allege some part performance of the contract, or else a definite contract between the parties.⁵¹ In an action against three defendants to recover the purchase price of land, a complaint alleging that the deed therefor was executed to one defendant at the request of the other two, who were the real purchasers, that the grantee named in the deed executed a note secured by mortgage on the land for the deferred pay-

⁴² Gouldin v. Buckelew, 4 Cal. 107.

⁴³ Id.

⁴⁴ La Fayette Ins. Co. v. Rogers, 30 Barb. 491; Hook v. White, 36 Cal. 299.

⁴⁵ Cheney v. Cook, 7 Wis. 413.

⁴⁶ Beecher v. Conradt, 13 N. Y. 110, 64 Am. Dec. 535.

⁴⁷ Brownson v. Perry, 71 Kan. 578, 81 Pac. 197.

⁴⁸ Bailey v. Lay, 18 Colo. 405, 33 Pac. 407.

⁴⁹ Id.

⁵⁰ Howard v. Higgins, 137 Cal. 227, 69 Pac. 1060; Glassman v. Condon, 27 Utah, 463, 76 Pac. 343.

⁵¹ Abbott v. Kline, 33 Wash. 686, 74 Pac. 1014.

ment, and that the other two defendants, at the same time, and as part of the same transaction, executed a bond or guaranty for the payment of said sum, states a cause of action against all the defendants. In an action for the purchase price of land conveyed to the defendant, in which there is no denial of the allegation of the complaint that the defendant was in possession at the time of the commencement of the action, nor a denial of any other material allegation of the complaint, the plaintiff is entitled to judgment on the pleadings.⁵²

§ 5734. Notice of rescission.—To entitle the vendor to rescind, he must make tender as provided in the contract, demand performance, and give notice to the vendee that the contract will be rescinded on his failure to comply.⁵³ The vendor is in no position to rescind the agreement as long as he has not a clear title to offer the vendee.⁵⁴ A defense cannot be made upon grounds different from those given for refusal to convey upon tender being made.⁵⁵ If a deed has been received, a reconveyance must be tendered, and a subsequent transfer to another satisfies the contract.⁵⁶ The vendee must be in a position and willing to perform.⁵⁷

§ 5735. Rescission—Pleading—Damages.—A complaint in an action to set aside a writing purporting to be a contract for the sale of land belonging to a corporation defendant, which alleges that certain real estate agents, who signed the contract in behalf of the corporation, pretended they had authority from the corporation, by written resolution of its trustees, to contract for the sale of its lands, but that in fact they had no such authority, and which sets out the contract *in hæc verba*, to which the corporate seal is not attached, states a cause of action. And this is so, although the complaint also alleges that the plaintiff, before discovering the want of authority, paid a part of the purchase price, and that the corporation refused to return the amount paid upon demand of the plaintiffs, claiming the con-

52 *Hanna v. Savage*, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269.

53 *Kessler v. Pruitt*, 14 Idaho, 175, 93 Pac. 965.

54 *Higinbotham v. Frock*, 48 Or. 129, 120 Am. St. Rep. 796, 83 Pac. 536.

55 *Balkwill v. Spencer*, 45 Wash. 600, 88 Pac. 1029.

56 *Parkhurst v. Dickinson*, 41 Wash. 420, 83 Pac. 895.

57 *Palmer v. Washington Securities Inv. Co.*, 43 Wash. 451, 86 Pac. 640.

tract to be valid and binding, and had instituted suits against the plaintiffs to recover a balance due on the contract.⁵⁸ In an action for damages for fraud in procuring a release of a first contract of sale, and in indorsing a new contract for other property, it is necessary to allege the value of the substitute property as well as that of the property first agreed to be sold, in order to show that any damage has accrued from the fraud. If the action is for damages for breach of the first contract, and not for the fraud, the fraud should not be alleged by way of anticipation of an expected defense. In any view of the cause of action, if the complaint avers a rescission of the second contract for fraud, it must show damage from the fraud to justify the rescission, and must aver the value of the substituted property.⁵⁹ In an action by a vendor to set aside a contract for the sale of land on the ground of fraud, damages for anxiety, worry, and harassment arising from the fraudulent conduct of the defendant, and for expenses in taking care of the property contracted to be sold, are not recoverable, and allegations in the complaint setting out such damages should be disregarded as surplusage.⁶⁰ But if the vendor points out other lots than the ones he is actually selling, and represents them to be the lots for sale, the vendee, upon discovery of the fraud, may recover for the time, labor, trouble, and expense he has been to in improving the wrong lot.⁶¹

§ 5736. Rescission—Return of property received under contract.—In case of rescission, each party to the contract must restore to the other everything of value received.⁶² A general allegation of an offer by the purchaser to rescind the entire contract of sale and purchase, and to restore to the plaintiffs all and every part of the premises, is sufficient to support a judgment setting aside the sale, and requiring the purchaser to account and return all property received under the contract, although the spe-

⁵⁸ *Salfield v. Sutter County etc. Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105.

⁵⁹ *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386.

⁶⁰ *Newman v. Smith*, 77 Cal. 22, 18 Pac. 791. As to complaint stating cause of action for rescission of lease on ground of fraud, see *Wilson v. Moriarty*, 77 Cal. 596, 20 Pac. 134.

⁶¹ *Lawson v. Vernon*, 38 Wash. 422, 107 Am. St. Rep. 880, 80 Pac. 559.

⁶² *Fountain v. Semi-Tropic etc. Water Co.*, 99 Cal. 677, 34 Pac. 497; *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239, 24 Pac. 837; *Buena Vista etc. Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386; *Canham v. Plano Mfg. Co.*, 3 N. Dak. 229, 55 N. W. 583.

cific allegations as to tender of restitution do not include certain small items of personal property which had been thrown into the trade, and although the value of such items is not alleged.⁶³ If the contract does not provide that time is of the essence, nor stipulate for a forfeiture on failure to pay the price, the vendor, in order to recover the property by suit in ejectment, must show that the vendee has abandoned the contract.⁶⁴ Upon rescission of a contract by consent of both parties, the vendee, though in default, may recover earnest money paid, less the actual damages to the vendor, on account of his breach of contract.⁶⁵

§ 5737. **Time an essence of the contract.**—If time is made an essence of the contract which is to become canceled upon failure to pay in time, such failure to pay works a cancellation without further notice.⁶⁶

§ 5738. **Defense of defective title.**—If the vendee accepts a deed under an agreement for a good and unincumbered title, if there are any defects in the title, the vendee must rely upon the covenants in the deed, and cannot on such ground defend an action for the purchase price; but the same may be pleaded by way of counterclaim.⁶⁷ Objection cannot be made to the deed for the reason that it includes more of the vendor's land than is being sold.⁶⁸ In an action by the purchaser for damages arising from misrepresentations concerning the property, allegations in the answer that the vendor agreed to rescind the sale and return the purchase money offers no defense, and should be stricken out.⁶⁹ If the vendor has no title, and there is a flaw in the title of the one from whom he expects to get title, it is ground for the vendee to rescind.⁷⁰ A perfect title is one fairly deducible of record, free from reasonable doubt and litigation.⁷¹ Building restrictions in grants of real estate are incumbrances on

⁶³ Hill v. Wilson, 88 Cal. 92, 25 Pac. 1105.

⁶⁴ Brixen v. Jorgensen, 28 Utah, 290, 107 Am. St. Rep. 720, 78 Pac. 674; Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

⁶⁵ Gwin v. Calegaris, 139 Cal. 384, 73 Pac. 851.

⁶⁶ Sleeper v. Bragdon, 45 Wash. 562, 88 Pac. 1036.

⁶⁷ Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456.

⁶⁸ Schmidtke v. Keller, 44 Or. 23, 73 Pac. 332, 74 Pac. 222.

⁶⁹ Samson v. Beale, 27 Wash. 557, 68 Pac. 180.

⁷⁰ Smith v. Glenn, 40 Wash. 262, 82 Pac. 605.

⁷¹ Whelan v. Rossiter, 1 Cal. App. 701, 82 Pac. 1082.

the title.⁷² Tax-sales and unsatisfied mortgages, though barred, are incumbrances requiring litigation to remove them.⁷³

§ 5739. **Fraud.**—A fraud, or breach of warranty, must be specially alleged in the answer, in order to be admissible in proof.⁷⁴ The mere fact that a vendor of land was aware of the existence of a judgment, which was an incumbrance on the land at the time of his sale, and failed to inform the vendee of the existence of such judgment, is not a fraud so as to constitute a defense to a suit on a note for the purchase money, where the means of information—to-wit, the county records—were equally accessible to both parties. In such case, if the vendee neglect to inform himself, he is guilty of negligence, and cannot set up his ignorance as a ground of fraud, unless by deceit or misrepresentation he has been misled.⁷⁵

Fraudulent statements, inducing a contract for sale of land, that a certain person was arranging to engage in a certain business, and that plaintiff was then duly authorized by him to act in his behalf, relate to present facts, and not to acts to be performed in the future.⁷⁶

§ 5740. **Covenant against incumbrances.**—In order to enable one to maintain an action upon a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee.⁷⁷ The weight of American authority is that a covenant against incumbrances, as generally expressed, standing by itself as a separate and independent covenant, is a covenant *in præsentî*, and broken, if at all, at the instant of its creation, and does not run with the land.⁷⁸ As to an action or defense, much depends upon the form of the covenant. If coupled with a covenant for quiet enjoyment, it is held to be *in futuro*, and to run with the land.⁷⁹ If the covenant is simply one of indemnity, the covenantee can only recover nominal damages, unless he can show actual damages, or that he has had to pay money to remove it.⁸⁰ But if it is to perform some specific thing, or to save the

⁷² Whelan v. Rossiter, 1 Cal. App. 701, 82 Pac. 1082.

⁷³ Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726.

⁷⁴ Deifendorff v. Gage, 7 Barb. 18.

⁷⁵ Ward v. Packard, 18 Cal. 391.

⁷⁶ O'Connor v. Lighthizer, 34 Wash. 152, 75 Pac. 643.

⁷⁷ Swall v. Clarke, 51 Cal. 227.

⁷⁸ 2 Wait's Pr. 380. See Huyek v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432, 20 N. E. 581, 3 L. R. A. 789.

⁷⁹ Hutchins v. Moody, 30 Vt. 658; Hall v. Dean, 13 John. 105.

⁸⁰ Churchill v. Hunt, 3 Denio, 321, 326; Richard v. Bent, 59 Ill. 38, 14

covenantee from a charge or liability, the right of action is complete upon a failure to do the act, or when such charge or liability is incurred.⁸¹

Incumbrances created or suffered by the purchaser do not constitute a breach of the warranty in the vendor's deed, and their existence does not preclude the vendor from giving a warranty deed.⁸²

§ 5741. **Possession as notice.**—Possession excites inquiry with reference to title, and operates as effectually to notify the purchaser of any other circumstances, knowledge of which may be brought home to him.⁸³

§ 5742. **Insufficient notice.**—Mere pendency of a suit relating to a trust estate does not, as a matter of law, charge subsequent purchasers with notice.⁸⁴ Mere fact that a deed is a quitclaim deed does not charge a purchaser with notice, nor put him upon inquiry.⁸⁵ The fact that a patent was not issued upon a certificate of purchase is not sufficient to charge a purchaser with notice that it was issued fraudulently.⁸⁶

§ 5743. **Sufficient notice.**—*Caveat emptor* is the rule in all purchases as to the title, in absence of stipulation to the contrary.⁸⁷ Knowledge by notice to attorney, counsel, or agent, acquired during negotiations for purchase, is constructive notice to the principal.⁸⁸ Knowledge of the husband of the grantee, acting as her agent, is sufficient.⁸⁹ A deed to the same property, recorded under an assumed name, in fraud of rights of the *cestui que trust*, puts a purchaser upon inquiry.⁹⁰

Am. Rep. 1; Ardesco Oil Co. v. North American Min. etc. Co., 66 Pa. St. 375, 381. See, as to damages recoverable, Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. Rep. 57, 12 Atl. 401.

⁸¹ Port v. Jackson, 17 Johns. 239; Gardner v. Niles, 16 Me. 280; Jennings v. Norton, 35 Me. 309; Gilbert v. Wiman, 1 N. Y. 550, 49 Am. Dec. 359.

⁸² Stein v. Waddell, 37 Wash. 634, 80 Pac. 184.

⁸³ Petrain v. Kiernan, 23 Or. 455, 32 Pac. 158.

⁸⁴ Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209, 31 Pac. 166.

⁸⁵ Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Graff v. Middleton, 43 Cal. 341.

⁸⁶ Marshall v. Farmers' Bank, 115 Cal. 330, 42 Pac. 418, 47 Pac. 52.

⁸⁷ Watson v. Sutro, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

⁸⁸ Id.; Connelly v. Peck, 6 Cal. 348; Donald v. Beals, 57 Cal. 399; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

⁸⁹ Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982.

⁹⁰ Eversdon v. Mayhew, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382.

FORMS—ACTIONS ON CONTRACTS FOR SALE OF REALTY.

§ 5744. Complaint by purchaser against vendor, for breach of agreement to convey.

Form No. 1627.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff and defendant entered into an agreement, under their hands and seals, of which the following is a copy: [Insert copy of contract.]

II. That on the . . . day of . . . , 19.., the plaintiff demanded the conveyance of the said property from the defendant, and tendered [. . . dollars] to the defendant. [Or, was ready and willing, and offered to the defendant to pay . . . dollars, and duly to perform all his agreements under the said covenants, upon the like performance by the defendant.]

III. That on the . . . day of . . . , 19.., the plaintiff again demanded such conveyance. [Or, that the defendant refused to execute the same.]

IV. That the defendant has not executed any conveyance of the said property to the plaintiff.

[Or, IV. That there is a mortgage upon the said property, made by . . . to . . . , for . . . dollars, recorded in the office of . . . , on the . . . day of . . . , 19.., and still unsatisfied of record; or any other defect of title.]

[DEMAND OF JUDGMENT.]

§ 5745. Performance—Averment of excuse for non-performance.

Form No. 1628.

That on the . . . day of . . . , 19.., at . . . , and before the time for performance had arrived, the defendant falsely and fraudulently represented to the plaintiff that he had sold said . . . to other persons; and that, relying on said representation, and solely by reason thereof, the plaintiff was not prepared to receive and pay for the same, as he otherwise would have done.

§ 5746. Complaint by purchaser against vendor, for damages for not executing conveyance, and for repayment of purchase money.

Form No. 1629.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . , day of . . . , 19.. , at . . . , the plaintiff and defendant entered into an agreement under their hands and seals, of which the following is a copy: [Insert copy.]

[Or, I. That on the . . . day of . . . , 19.. , at . . . , the defendant agreed with the plaintiff, that in consideration of the sum of . . . dollars, the receipt whereof was acknowledged by the defendant in said agreement, in part payment, and of the further sum of . . . dollars, for which defendant agreed to take a note secured by a mortgage on the premises hereinafter described, said note and mortgage to be payable in one year from the . . . day of . . . , 19.. , and to bear interest at ten per cent per annum, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, the farm, then the residence of the defendant, in the town of . . . , county of . . . , and state of . . . , containing . . . acres or thereabouts, for the sum of . . . dollars per acre, and that the defendant would, on the said . . . day of . . . , 19.. , at the . . . office, in . . . city, between the hours of . . . o'clock in the morning and . . . o'clock in the evening, on receiving said note and mortgage, execute to the plaintiff a good and sufficient conveyance of the said premises, free from all incumbrances, and he further agreed to pay to this plaintiff, on failure of performance, . . . dollars, liquidated damages. And the plaintiff agreed that he would, at the time and place above mentioned, on the execution of said conveyance, make, execute, and deliver to the defendant the note and mortgage aforesaid.]

II. That on the . . . day of . . . , 19.. , at . . . [day and place agreed], the plaintiff demanded the conveyance of the said property from the defendant, and tendered to the defendant a note and mortgage made and executed pursuant to the agreement, and was ready and willing, and offered to the defendant, to make and execute the note and mortgage agreed on, and to deliver the same to the defendant, and duly to perform all his agreements under the said covenant, upon the like performance by

the defendant, and otherwise has duly performed all the conditions of said agreement on his part.

III. That on the . . . day of . . . , 19.., at . . . , the plaintiff again demanded such conveyance. [Or, that the defendant refused to execute the same.]

IV. That the defendant has not executed any conveyance of the said property to the plaintiff, nor has he repaid to the plaintiff the said . . . dollars paid by this plaintiff to the defendant in part payment for said property.

[DEMAND OF JUDGMENT.]

§ 5747. Complaint by vendor against purchaser, for breach of agreement to purchase.

Form No. 1630.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , in the county of . . . , and state of . . . , the plaintiff and defendant entered into an agreement, under their hands and seals, of which the following is a copy: [Insert copy.]

II. That on the . . . day of . . . , 19.., at . . . , the plaintiff was the owner in fee simple of the said property, and the same was free from all incumbrances, as was made to appear to the defendant, and at said time and place he tendered to the defendant a sufficient deed of conveyance of the same [or, was ready and willing, and offered to convey the same to the defendant by a sufficient deed], on the payment by the defendant of the said sum.

III. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

§ 5748. Averment of excuse for non-performance.

Form No. 1631.

That on the . . . day of . . . , 19.., and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff that he had determined not to take the land; and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage in the sum of . . . dollars.

§ 5749. Complaint by vendor against purchaser, for not fulfilling agreement, and for deficiency on resale.

Form No. 1632.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff was the owner of four fifty-vara lots, situated in the western addition of the city and county of . . . , to-wit, lots 1, 2, 5, and 6, in block No. . . . ; that he put them up for sale at auction at the auction-rooms of C. D. & Co., No. . . . , . . . street, in the city of . . . , on the . . . day of . . . , 19.., and announced before the commencement of the sale, as a part of the terms of sale, that ten per cent of the purchase money was, on the day of sale, to be paid by the purchaser to the auctioneers, C. D. & Co.; and that if any purchaser failed to make such payment, the lots would be resold, and the purchaser be charged with the deficiency.

II. That at the said sale A. B., the defendant, bid for and became the purchaser of each and all of the said lots, for the price of . . . dollars, gold coin, for each lot.

III. That the said defendant did not, on the day of such sale, or at any other time, pay ten per cent, or any part of the price bid, nor the purchase money, nor any part thereof.

IV. That in consequence of such neglect of payment, and after notice given to the defendant of the time and place when and where the said lots should be resold on his account, and that he would be charged with the deficiency, the said lots were put up to resale, and resold at the price of . . . dollars for each lot, making a deficiency of . . . dollars upon the said four lots.

V. That the defendant has not paid said deficiency.

[DEMAND OF JUDGMENT.]

§ 5750. Complaint by vendor against executor of purchaser.

Form No. 1633.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff and the said A. B. entered into a contract in writing, under their respective hands, of which the following is a copy: [Copy of agreement.]

II. That on the . . . day of . . . , 19.., at . . . , the said A. B. died, leaving a last will and testament, by which he devised the said property as follows: [Set forth devise.]

III. That the defendant was appointed by said will as the executor of said A. B., and by an order of the probate court of the county of . . . , in this state, made on the . . . day of . . . , 19.., said will was admitted to probate, and the defendant was then appointed and duly qualified as such executor.

IV. That on the . . . day of . . . , 19.., the plaintiff offered to the defendant to convey the premises to him and the said [other devisees], and fully to perform said contract on his part, and requested the defendant to pay the money for the same, pursuant to the contract.

V. That the defendant then wholly refused to do so.

VI. That he has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5751. Complaint by vendor against purchaser, for real property contracted to be sold, but not conveyed.

Form No. 1634.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [the house and lot No. . . . , . . . street], for . . . dollars. The following is a copy of said agreement: [Insert copy.]

II. That on the . . . day of . . . , 19.., at . . . , the plaintiff tendered [or, was ready and willing, and offered to execute] a sufficient deed of conveyance of the said property to the defendant, on payment of the said sum, and still is ready and willing to execute the same.

III. That the defendant has not paid the said sum, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 5752. Complaint by purchaser against vendor, coupled with claim for redelivery of securities for purchase money.

Form No. 1635.

[TITLE.]

First. For a first cause of action, plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , this plaintiff and the defendant entered into an agreement in writing, whereby the defendant agreed to sell to the plaintiff the following-described real property in the county of . . . , state of . . . , to-wit: [description], containing . . . acres, or thereabouts, for the sum of . . . dollars per acre, and agreed that on the first day of . . . next ensuing, at the county clerk's office, in the city of . . . , in said county, between the hours of eight o'clock in the morning and six in the evening, on receiving from the plaintiff the sum of . . . dollars per acre, he would, at his own expense, execute and deliver a deed conveying the fee simple of said real property to this plaintiff free of all incumbrances; and plaintiff agreed that, at the time and place above mentioned, on the execution and delivery of such deed, he would pay to the defendant the sum of . . . dollars per acre, as aforesaid; and in said agreement the defendant acknowledged the payment by the plaintiff of one thousand dollars on account of the purchase price of said land; and further agreed to take a mortgage conditioned for the payment of six thousand dollars of the purchase money, said mortgage to be payable in one year from said first day of . . . , and to bear interest at . . . per cent per annum; and defendant further agreed that, in the event of said defendant's failure to perform the part of said agreement by him agreed to be performed, he would pay to plaintiff damages therefor; that the damages accruing to plaintiff on account of such failure to perform were then and there agreed to amount to . . . dollars.

II. That on the [day agreed] at [the place agreed] the plaintiff was ready and willing to fulfill said agreement on his part in all respects [or, where a tender was necessary: That on the . . . day of . . . , 19.. , at . . . , the plaintiff was ready and willing to fulfill the agreement on his part in all respects, and then and there offered to the defendant to accept a conveyance of the premises, and tendered to the defendant a mortgage drawn and executed pursuant to the agreement, and the residue of the purchase money in cash]; and otherwise has duly performed all the conditions of said agreement on his part.

III. That the defendant refused to convey the said premises pursuant to the agreement, and he then could not, and cannot now, convey a good title to the farm free of all incumbrances, but, on the contrary, the same was, and still is, subject to various defects and incumbrances, and in particular to a lease

made by him to the trustees of the school district for the erection and use of a schoolhouse, and to the inchoate right of dower of the wife of one G. H., who is still living; wherefore, the defendant failed to perform his agreement, to the damage of the plaintiff in the sum of . . . dollars.

Second. And for a second cause of action, the plaintiff alleges:

[Restate paragraph I.]

II. That the payment of one thousand dollars, hereinbefore stated to have been made by the plaintiff to the defendant in pursuance of the said agreement, was made by a negotiable promissory note for that amount, made by this plaintiff, payable to the order of one W. H., and indorsed by him, which note was delivered to the defendant, and accepted by him in payment of said sum of one thousand dollars, and still remains in his possession.

Wherefore, the plaintiff demands judgment against the defendant:

1. For the sum of . . . dollars, damages, and for the costs of this action; 2. That defendant be required to cancel and to deliver up to plaintiff said note.

§ 5753. Allegation of delivery in escrow.

Form No. 1636.

I. The defendant alleges that he gave said deed [or other writing] to secure the repayment of . . . dollars, then lent by the plaintiff to one M. N., and that he delivered said deed, not to the plaintiff or his agent, but to one O. P., as in escrow, to be kept by him upon condition that if the said M. N. should within . . . months secure the repayment of said sum of money to the plaintiff by a mortgage upon his freehold at . . . , that then the said deed should be immediately discharged and annulled, and returned to the defendant, and that only in case of default of the said M. N. so securing the repayment of the said sum should the said deed of the defendant stand in force.

II. That within the time agreed, and on the . . . day of . . . , 19. . . , said M. N. did secure the repayment of the said sum to the plaintiff by a mortgage upon said freehold, which the plaintiff then and there accepted as such security, whereby the deed of the defendant so delivered in escrow became void.

§ 5754. Denial of conditional delivery.

Form No. 1637.

The defendant denies the allegations of the complaint herein whereby it is alleged that the said note [or, deed] described in said complaint was executed and delivered by the plaintiff upon the condition or understanding set forth in said complaint; and on the contrary thereof, this defendant alleges that the said deed [or, note] was executed and delivered by the said plaintiff absolutely and without condition.

§ 5755. Allegation of breach of warranty.

Form No. 1638.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff warranted the property therein mentioned to be free from incumbrances.

II. That there was then, and still is, a mortgage on the same, in the sum of . . . dollars, unsatisfied, of record in book . . . , page . . . , of mortgages, in the office of the recorder of the county of . . . , in this state, and the same then was, and still is, a valid and subsisting lien and incumbrance upon the said premises.

CHAPTER CXXXVI.

COVENANTS.

§ 5756. **Action on covenant—Assignment of breach.**—In order to enable one to maintain an action on a covenant, there must not only be a breach of the covenant, but some loss or damage to the covenantee.¹ The covenant of quiet enjoyment and of general warranty requires the breach to show an eviction.² Covenants are to be considered dependent or independent according to the intention of the parties, which is to be deduced from the whole instrument.³ Where covenants are dependent, an action cannot be maintained without showing a performance on plaintiff's part of every affirmative covenant.⁴ That a party covenanted by indenture, imports that a covenant was under seal;⁵ and an averment of execution imports delivery.⁶ The grantee in a deed-poll is bound by the covenants therein contained to be performed by him, and an action of covenant lies for a breach thereof. By acceptance of such a deed, the grantee is estopped from denying his covenants, or that the seal attached to the deed is his own as well as the grantor's. Even if an action of covenant will not lie in such case against the grantee, a court of equity will restrain him or his grantees from doing what, by such covenant, he has agreed not to do.⁷

§ 5757. **Covenant to sue.**—A covenant not to sue for five years is no bar to the action; but the defendant must rely upon the covenant for his remedy.⁸ A covenant not to sue, made to a portion only of joint debtors, does not release any of them.⁹

1 Swall v. Clarke, 51 Cal. 227. As to averment of breach, see Woolley v. Newcombe, 87 N. Y. 605.

2 Rickert v. Snyder, 9 Wend. 416; Marston v. Hobbs, 2 Mass. 433, 3 Am. Dec. 61.

3 Philadelphia R. R. Co. v. Howard, 13 How. 307, 339, 14 L. Ed. 157.

4 Webster v. Warren, 2 Wash. C. C. 456, Fed. Cas. No. 17339.

5 Cabell v. Vaughan, 1 Saund. 291; Phillips v. Clift, 4 Hurlst. & N. 168.

6 Brinckerhoff v. Lawrence, 2 Sandf. Ch. 400.

7 Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556.

8 Howland v. Marvin, 5 Cal. 501.

9 Matthey v. Gally, 4 Cal. 62, 60 Am. Dec. 595.

§ 5758. **Eviction, what is—Averment of.**—Eviction by process of law is not necessary to enable an action to be maintained on the covenant.¹⁰ And an averment that the vendor had not a good and sufficient title to the said tract of land, and by reason thereof the said plaintiffs were ousted and dispossessed of the said premises by due course of law, is sufficient.¹¹ In a declaration upon a covenant of warranty, it is necessary to allege substantially an eviction by title paramount, or that defendant warrantor was made a party in such action;¹² but no formal terms are prescribed in which the averment is to be made.¹³ A purchaser in possession cannot reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed;¹⁴ nor on the ground that the title existed elsewhere than in the grantor.¹⁵ That the plaintiff was lawfully evicted from the right and title to the premises by a paramount and lawful title to the same does not import an ouster from possession.¹⁶ Where the covenantee is held out of possession by one in actual possession under a paramount title, the covenant is broken.¹⁷ The use of a right of way by the party entitled to it is an eviction of the servient estate, within a covenant of warranty against all "lawful claims," for which the latter may sue as assignee of the covenantee.¹⁸

§ 5759. **Judgment covenants.**—Where the parties to a deed covenanted severally against their own acts and incumbrances, and also to warrant and defend against their own acts and those of all other persons, with an indemnity in land of an equivalent value, in case of eviction, these covenants are independent, and it is unnecessary to allege in the declaration any eviction or any demand, and refusal to indemnify with other lands, but it is sufficient to allege a prior incumbrance by the acts of the grantors, etc.; and that the action might be sustained on the first covenant for the recovery of pecuniary damages.¹⁹

¹⁰ McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

¹¹ Day v. Chism, 10 Wheat. 449, 6 L. Ed. 363.

¹² Baumgarten v. Chipman, 30 Utah, 466, 86 Pac. 411.

¹³ Rickert v. Snyder, 9 Wend. 416; Day v. Chism, 10 Wheat. 449, 6 L. Ed. 363.

¹⁴ Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322.

¹⁵ Fowler v. Smith, 2 Cal. 44.

¹⁶ Blydenberg v. Cotheal, 1 Duer, 176.

¹⁷ Witty v. Hightower, 12 Smed. & M. (Miss.) 478.

¹⁸ Russ v. Steele, 40 Vt. 310.

¹⁹ Duvall v. Craig, 2 Wheat. 45, 4 L. Ed. 180.

§ 5760. **General covenant of warranty.**—If a deed contains a general covenant of warranty of lands thereby intended to be conveyed, and also a covenant that if any portion of the land has been before conveyed to other persons, the grantor will convey to the grantee other lands of like quality, the former covenant relates to land which the deed purports to convey, and not to the land which the grantor covenanted to convey in the latter covenant.²⁰ Where a deed purported to convey tide-land as well as upland, though at the time the greater part of the land was openly, plainly, visibly, and notoriously tide-land owned by the state, and the covenant warranting the entire tract, the defendant was liable for a breach thereof.²¹ A deed containing a general covenant to warrant and defend against “all persons whatsoever” includes a warranty against the state.²² Where land is sold with a covenant of warranty, accompanied with delivery of possession, and the purchaser gave a note in payment, the warranty and the promise to pay are independent covenants.²³ A covenant of the grantor, warranting the title of the land sold as “indisputable and satisfactory,” is not broken if the title is good and valid.²⁴ A covenant of non-claim in a deed amounts to a covenant of warranty, and operates equally as an estoppel.²⁵ The covenant of warranty runs with the land, and the vendor is liable directly to the person evicted.²⁶ Where a covenant of warranty is based upon a right or title, which is subsequently, by a judgment of the court, adjudged invalid, and five years are given by statute to appeal from said judgment, an action for breach of the covenant will not lie till the five years have expired.²⁷

§ 5761. **Notice of action.**—Verbal notice is sufficient.²⁸ If the covenantor has notice of the action, the covenantee is not bound to defend. The proceedings will be conclusive against the covenantor in this action.²⁹

20 *Vance v. Pena*, 33 Cal. 631.

21 *West Coast Mfg. Co. v. West Coast Imp. Co.*, 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

22 *Id.*

23 *Norton v. Jackson*, 5 Cal. 263.

24 *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

25 *Gee v. Moore*, 14 Cal. 472.

26 *Blackwell v. Atkinson*, 14 Cal. 470.

27 *Hills v. Sherwood*, 33 Cal. 474.

28 See *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105.

29 *Jackson v. Marsh*, 5 Wend. 44; *Cooper v. Watson*, 10 Wend. 202.

§ 5762. **Remedy.**—If a party takes a conveyance without covenants, he may rely upon the covenants implied by statute³⁰ in case of failure of title; and if he takes a conveyance with covenants, his remedy upon failure of title is confined to them.³¹

§ 5763. **Time to sue.**—Where the state evicted a person claiming state land under a deed, in 1894, and an action for breach of warranty of the deed was commenced in 1899, the six-year statute of limitations will not bar a recovery.³²

§ 5764. **Assignment of breach—Payment by covenantee.**—A breach of covenant is sufficiently assigned by negating the words of the covenant.³³ If the special facts to negative a covenant are necessarily included in the general averment of the breach, a distinct and substantive averment of them is not necessary.³⁴ A general covenant against incumbrances is broken by the existence of an incumbrance at the making of the deed. The breach must set out the particular incumbrance relied on.³⁵ In an action on an alleged breach of warranty in a deed for the failure of title to certain lands, an allegation in the complaint that the defendant "claimed to own, and held itself out as the owner of, all lands to deep water," at the time the contract of sale was made, a year before the deed was executed, was properly stricken out as irrelevant and immaterial.³⁶

An allegation that certain persons recovered judgment against the owner, which were liens and incumbrances, is sufficient, without stating the fact of docketing said judgment, or its legal effect.³⁷ A covenant that the whole amount of a judgment is due is not to be construed to mean that no one of the judgment debtors has been released.³⁸ When an action is brought on the breach of a covenant in the contract, it is enough to allege the con-

³⁰ Cal. Civ. Code, § 1113.

³¹ Peabody v. Phelps, 9 Cal. 213.

³² West Coast Mfg. etc. Co. v. West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

³³ McGeehan v. McLaughlin, 1 Hall, 37. See Woolley v. Newcombe, 87 N. Y. 605.

³⁴ Randel v. President etc. Chesapeake etc. Canal Co., 1 Har. (Del.) 151; Breckenridge's Admr. v. Lee's Exrs., 3 Bibb. (Ky.) 330.

³⁵ Shelton v. Pease, 10 Mo. 473;

Julliland v. Burgott, 11 Johns. 6; Thomas v. Van Ness, 4 Wend. 549. Compare People v. Russell, 4 Wend. 570.

³⁶ West Coast Mfg. etc. Co. v. West Coast Imp. Co., 25 Wash. 627, 66 Pac. 97, 62 L. R. A. 763.

³⁷ Cady v. Allen, 22 Barb. 388. See, also, Chamberlain v. Gorham, 20 Johns. 746; reversing 20 Johns. 144.

³⁸ Bennett v. Buchan, 5 Abb. Pr. (N. S.) 412.

veyance according to its legal effect, showing a consideration for the covenant, and then set forth a copy of the covenant,³⁹ thus combining the two systems of pleading for the sake of brevity. This method will be desirable when the contract is of great length. So in a covenant to pay certain accounts it is not necessary to set out the accounts so paid, thereby producing great prolixity.⁴⁰ Where a complaint avers a sale and conveyance, the existence of the mortgage, the execution of the bond, the failure of the defendant to comply with its conditions, the consequent sale of the premises under the mortgage, and their loss to the plaintiff, it was held sufficient on demurrer.⁴¹ And consideration need not be alleged, as in pleading on a sealed instrument the seal imports consideration. Without the averment of payment of the incumbrance, plaintiff can recover only nominal damages,⁴² except in the case of a covenantee who bought for the purpose of a resale, with notice to the covenantor at the time of sale.⁴³ In such a case those facts, and the diminution in value of the estate, and the expenditure in paying off the incumbrance, should be alleged, the latter as a special averment of damage.⁴⁴

§ 5765. **The same—Description of land conveyed.**—A brief description will be sufficient, with profert of conveyance.⁴⁵

§ 5766. **Condition precedent.**—Where a deed contains a covenant that in case the grantees shall pay a certain sum of money before a certain day “then this instrument is to take effect as a full and complete conveyance in fee of all,” etc., the payment of the purchase money was held to be a condition precedent to vesting the estate.⁴⁶

§ 5767. **Covenant in mortgage.**—If the mortgagor covenants to pay and discharge all legal mortgages and incumbrances, the covenant will make the mortgagor personally liable for the sum

³⁹ Swan's Pl. 198.

⁴⁰ Jones v. Hurbaugh, 5 N. Y. Leg. 201.
Obs. 19.

⁴¹ McCarty v. Beach, 10 Cal. 461.

⁴² Delavergne v. Norris, 7 Johns. 358, 5 Am. Dec. 281; Hall v. Dean, 13 Johns. 105; Stanard v. Eldridge, 16 Johns. 254.

⁴³ Batchelder v. Sturgis, 3 Cush.

201.

⁴⁴ De Forest v. Leete, 16 Johns.

122.

⁴⁵ 1 Saund. 233, n. 2; 2 Chit. Pl.

192, n. 1; Dunham v. Pratt, 14 Johns.

372.

⁴⁶ Mesick v. Sunderland, 6 Cal. 297.

due and secured by an executory contract for a mortgage not under seal or recorded, if the mortgagor had actual notice of it, and the mortgage will become security for the performance of the covenant.⁴⁷ It does not put the purchaser from the mortgagor upon any inquiry as to any mortgages or incumbrances not of record.⁴⁸

§ 5768. Measure of damages.—A party having been defeated in a suit against him for damages for having interfered with an easement on his land may recover of his warrantor the damage he has sustained in consequence of the breach of the covenant against incumbrances, and such costs and expenses as he has fairly and in good faith incurred in attempting to maintain and defend his title.⁴⁹ He was not bound to follow the advice of his warrantor by suing the party who claimed the easement and entered upon the premises.⁵⁰ “There is,” says Lord Mansfield, “a difference between covenants in general and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election; he may either bring an action of debt, and recover the penalty, after which recovery of the penalty he cannot resort to the covenant; or, if he does not choose to go for the penalty, he can proceed upon the covenant and recover more or less than the penalty *toties quoties*.”⁵¹

Where defendant in good faith sold and attempted to convey to plaintiff by warranty deed the land within a certain inclosure, but did not have full title to, and her deed did not cover a portion of, the land, plaintiff's remedy would be in an action for damages for breach of the warranty, which, under section 3304 of the California Civil Code, would be such portion of the price as the value of the property affected by the breach bore at the time of the granting to the value of the whole property.⁵² Where two tracts of land are sold with covenant of warranty, and title to one fails, the measure of damages is a portion of the consideration money corresponding to the proportionate value of the tract lost. The measure of damages for a breach of a covenant of warranty of title is the consideration money lost to the buyer,

⁴⁷ *Racouillat v. Sansevain*, 32 Cal. 376.

⁴⁸ *Racouillat v. Rene*, 32 Cal. 450.

⁴⁹ *Smith v. Sprague*, 40 Vt. 43.

⁵⁰ *Id.*

⁵¹ *Sedgwick on Damages*, 424. See

Lowe v. Peers, 4 Burr. 2225. See, also, *Bird v. Randall*, 1 W. Bl. 373, 387; *Winter v. Trimmer*, 1 W. Bl. 395; *Harrison v. Wright*, 13 East, 343.

⁵² *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321.

and not the value of the property less any unpaid consideration. The value of improvements made under a contract for a deed cannot be recovered in an action for breach of covenant of warranty in the deed, the contract of sale having become merged in the deed.⁵³ An attorney's fee, in addition to the statutory attorney's fee, cannot be allowed in an action for damages for the alleged violation of the covenants of a lease.⁵⁴

§ 5769. **Personal responsibility.**—B. gave P. an option on land by an agreement providing that P. should open a highway across such land and other land not then owned but to be acquired by P. Such contract was recorded; the option was exercised, a deed given, making no reference to the highway, but with a collateral undertaking continuing the agreement to open the highway; and P. acquired the other land. In a suit for specific performance of the agreement as to the highway, by a purchaser of other land of B. against the purchaser of P.'s land, it was held that the agreement was only an executory undertaking, wholly collateral to the land, and entirely personal, creating no easement, and, even if enforceable in plaintiff's favor against P., so far as concerns the land which P. acquired from B., was not binding on defendant, who did not know of it, the record of the agreement not being constructive notice to him in view of the deed apparently conveying the title without reference to it.⁵⁵

§ 5770. **Estoppel.**—One who has covenanted with executors, as such, that third persons should satisfy and discharge a mortgage, is thereby estopped from denying the right of executors to sue on such covenant in their representative capacity.⁵⁶ But a subsequent grantee may maintain an action against the grantor on a covenant.⁵⁷ The fact that the grantee has some notice, from third parties, that the grantor had parted with title to certain water, which was covered by a covenant of warranty in a deed from the grantor to the grantee, does not estop the grantee from a recovery on account of the breach of such warranty.⁵⁸

⁵³ *West Coast Mfg. etc. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455.

⁵⁴ *Spencer v. Commercial Co.*, 36 Wash. 374, 78 Pac. 914.

⁵⁵ *Houston v. Lahm*, 44 Or. 610, 76 Pac. 641, 65 L. R. A. 799.

⁵⁶ *Farnham v. Mallory*, 5 Abb. Pr. (N. S.) 380.

⁵⁷ *Colby v. Osgood*, 29 Barb. 339.

⁵⁸ *Bailey v. Murphy*, 19 Colo. App. 310, 74 Pac. 793.

§ 5771. **Incumbrances.**—The term “incumbrances” includes taxes, assessments, and all liens upon real property.⁵⁹ No tax or assessment can exist until the amount thereof is ascertained and determined. Hence, although the expense has been incurred at the time of conveyance, to meet which a local assessment is subsequently laid upon the premises conveyed which are legally chargeable therewith, such assessment does not constitute a breach of the covenant against incumbrances.⁶⁰ Only nominal damages can be recovered until after actual payment of the incumbrance.⁶¹

The fact that one of the deeds under which a grantor deraigned title contained a covenant that no liquor saloon should be maintained on the premises, with a condition of reversion in case of breach of such covenant, did not constitute a breach of the grantor's implied covenant against incumbrances, in the absence of any eviction or disturbance of the grantee or any damage suffered by him.⁶² Defendants sold a city lot to plaintiffs by a deed warranting against incumbrances. After the sale the vendors paid an assessment for a public improvement, which had been levied prior to the sale of the property. Thereafter the assessment was found illegal by the court, and the court passed an act providing for a reassessment. Such an assessment was a breach of the covenant, and the amount paid thereon by the vendees could be recovered by them of the vendors.⁶³ In an action by husband and wife to recover on a covenant against incumbrances contained in a deed to the wife, it is immaterial which of plaintiffs actually paid over the money to remove the incumbrance, if it was in fact done with their money.⁶⁴

§ 5772. **Purchase after breach.**—A purchaser of a mill, after breach of covenant by a railroad company, with its former owner, to dig a new channel, etc., for the mill-stream, cannot sue on said covenant.⁶⁵ Where defendant made a valid agreement with three partners not to do business in a certain place, and two of said

⁵⁹ Cal. Civ. Code, § 1114.

⁶⁰ Dowdney v. Mayor etc., 54 N. Y. 186. See *De Peyster v. Murphy*, 39 N. Y. Super. Ct. (7 Jones & Sp.) 255.

⁶¹ *Reading v. Gray*, 37 N. Y. Super. Ct. (5 Jones & Sp.) 79. See, also, *Blythe v. Gately*, 51 Cal. 236, as to when taxes become a lien.

⁶² *Thurgood v. Spring*, 139 Cal. 596, 73 Pac. 456.

⁶³ *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879.

⁶⁴ *Id.*

⁶⁵ *Junction R. R. Co. v. Sayers*, 28 Ind. 318.

partners sold out to a third, and left said place, but the third resold to defendant, and released said agreement, it was held that the other two partners could not sue for a breach, as the agreement was incident only to the business.⁶⁶

§ 5773. **To what covenant attaches.**—Every covenant relating to the thing demised attaches to the land, and runs with it.⁶⁷ But where the warranty in a deed contains a covenant to “warrant and defend the premises conveyed, from and against all or any incumbrances, claims or demands, created, made or suffered, by, through or under him, and against none other,” the warranty in the deed attaches itself to the interest conveyed, and not to the land itself.⁶⁸ A covenant of seisin runs with the land, and is divisible; so that if the land be sold in parcels to different purchasers, each may maintain an action on the covenant.⁶⁹ Where the covenantee in a deed of land takes possession and conveys, a covenant of warranty in the deed to him will pass to his grantee, although the covenantor was not in possession at the time of his conveyance.⁷⁰ A covenant to convey, contained in a lease, runs with the land and may be assigned.⁷¹

§ 5774. **Implied covenant.**—Where a deed containing the words “grant, bargain, and sell,” recites a mortgage existing at the time of the conveyance, with a warranty against the same, the general covenant implied by the words “grant, bargain, and sell,” is restrained by the special covenant.⁷² And the special covenant is not a covenant to pay the mortgage.

§ 5775. **Mortgage.**—When premises are described in the granting part of a deed as subject to a mortgage, such mortgage will not be in the covenant against incumbrances.⁷³ A covenant by a vendor of real estate, that neither he nor his assigns will sell any marl from the adjoining premises, will not be enforced in equity against the alienee of the land intended to be burdened with the covenant.⁷⁴

⁶⁶ Gompers v. Rochester, 56 Pa. St. 194.

⁶⁷ Laffan v. Naglee, 9 Cal. 662, 70 Am. Dec. 678.

⁶⁸ Kimball v. Semple, 25 Cal. 440.

⁶⁹ Schofield v. Iowa Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197.

⁷⁰ Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149.

⁷¹ Hagar v. Buck, 44 Vt. 285, 5 Am. Rep. 368.

⁷² Shelton v. Pease, 10 Mo. 473.

⁷³ Freeman v. Foster, 55 Me. 508.

⁷⁴ Brewer v. Marshall, 19 N. J. Eq. 537.

§ 5776. **Essential averments.**—In an action of covenant it must appear in the complaint with whom the covenant was made, the performance or readiness to perform, or the excuse for non-performance of a condition precedent, at the place and within the time specified.⁷⁵ An action cannot be maintained on a covenant of seisin, unless a breach and an eviction be alleged.⁷⁶ And when there has not been an eviction, something equivalent must be averred.⁷⁷ It is sufficient to negative the words of the covenant.⁷⁸ It is not necessary that a breach of a covenant should be assigned in the very words of the covenant. It is sufficient to aver what is substantially a breach.⁷⁹

§ 5777. **Implied covenants.**—A deed containing the words “grant, bargain, sell, and enfeoff,” is operative as a deed of feoffment, and livery of seisin is not necessary.⁸⁰ And, under the statute of Missouri, it was held that they are separate and independent of each other.⁸¹ In Illinois, the words “grant, bargain, and sell,” express covenants that the grantor is seised of an indefeasible estate in fee simple, free from incumbrances done or suffered by the grantor, as also for quiet enjoyment against the grantor, his heirs and assigns.⁸² It embraces such incumbrances only as the vendor has control of, and not an outstanding mortgage created by his grantor.⁸³ In Washington, the statute provides that bargain-and-sale deeds for conveyance of land, reciting that the grantor does “bargain, sell, and convey,” shall be adjudged an express covenant that the grantor had the fee.⁸⁴ In California, the Civil Code provides that “from the use of the word ‘grant’ in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by

⁷⁵ *Keatly v. McLaugherty*, 4 Mo. 221.

⁷⁶ *Robinson v. Neil*, 3 Ohio, 525; *King v. Kerr's Admr.*, 5 Ohio, 155, 22 Am. Dec. 777. See *Bowne v. Wolcott*, 1 N. Dak. 497, 48 N. W. 426; *Mygatt v. Coe*, 124 N. Y. 212, 26 N. E. 611, 11 L. R. A. 646.

⁷⁷ *Robinson v. Neil*, 3 Ohio, 525; *King v. Kerr's Admr.*, 5 Ohio, 155, 22 Am. Dec. 777; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456.

⁷⁸ 4 Kent Com. 479; *Rickert v. Snyder*, 9 Wend. 416.

⁷⁹ *Fletcher v. Peck*, 6 Cranch, 87, 3 L. Ed. 162.

⁸⁰ *Perry v. Price*, 1 Mo. 553.

⁸¹ *Alexander v. Schreiber*, 10 Mo. 460.

⁸² *Mosely v. Hunter*, 15 Mo. 322.

⁸³ *Armstrong v. Darby*, 26 Mo. 517.

⁸⁴ *Blood v. Sielert*, 38 Wash. 643, 80 Pac. 799.

express terms in such conveyance: 1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee; 2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."⁸⁵ Prior to the code, however, it was held that where there are no covenants of seisin, etc., in the deed the law will not imply other covenants than those for quiet possession.⁸⁶

Where plaintiff contracted with defendant for the purchase of land, at which time a water-right was appurtenant thereto, and defendant afterwards executed a deed "granting" the land to plaintiff, "together with the water-right thereon," which was the one appurtenant to the land when the negotiations were begun, and in the mean time he had conveyed the water-right to another, it was held that he was liable to the purchaser for the value of the water-right.⁸⁷

§ 5778. Damages, measure of.—When the grantor, in a deed containing a covenant of seisin, has not title to the land, the covenant is broken the instant it is made.⁸⁸ Such a covenant is an assurance to the purchaser that the grantor has the estate both in quantity and quality.⁸⁹ But where the vendor was actually seised, but of a defeasible estate, the damages should be merely nominal until the estate has been actually defeated.⁹⁰ The rule of damages, where there has been an actual loss of the premises, is the purchase money and interest. Where the plaintiff has purchased the paramount title, it is the sum actually and in good faith paid for the paramount title, and the amount expended in defending his possession; provided, such damages shall in no case exceed the purchase money and interest.⁹¹

⁸⁵ Cal. Civ. Code, § 1113.

⁸⁶ Fowler v. Smith, 2 Cal. 39.

⁸⁷ Lyles v. Perrin, 134 Cal. 417, 66 Pac. 472.

⁸⁸ Nichols v. Nichols, 5 Hun, 108.

⁸⁹ Pecare v. Chouteau, 13 Mo. 527.

⁹⁰ Reese v. Smith, 12 Mo. 344; Bircher v. Watkins, 13 Mo. 521;

Mosely v. Hunter, 15 Mo. 322. See, also, Cowdrey v. Coit, 44 N. Y. 382, 4 Am. Rep. 690.

⁹¹ McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456. See, also, Sears v. Stinson, 3 Wash. 615, 29 Pac. 205; Price v. Deal, 90 N. C. 290; Huntsman v. Hendricks, 44 Minn. 423, 46 N. W. 910.

§ 5779. Death of covenantor.—Where the covenantor dies before the discovery of the defect of title, and his personal representatives procure a good title and tender a deed to the covenantee, a court of equity will compel him to accept such conveyance, and enjoin a judgment at law for a breach of the covenant.⁹²

§ 5780. Covenant to build party-wall.—A covenant between A. and B., owners of adjoining premises, that A. may build a party-wall, half on each lot, and that when B. uses the same he shall pay half its cost, is personal, and does not pass with the land to A.'s grantee.⁹³ But in California, such an agreement creates an easement, attaching to the land.^{93a}

§ 5781. Covenant to remove buildings.—A covenant entered into between owners of adjoining city lots, for themselves and all claiming under them, to the effect that all buildings erected on such lots shall be set back a specified distance from the line of the street on which the lots front, is a covenant which equity will enforce between the parties to it, in favor of one against the other, or in favor of one against any subsequent grantee of either lot.⁹⁴ Where the lessee stipulates to surrender the premises at the end of the term, "reasonable use and wear thereof, and damages by the elements, excepted," it does not authorize the tenant to remove buildings erected by him on the lot, even if there be evidence of an oral agreement to that effect.⁹⁵

§ 5782. Special damages.—In an action to recover damages for the breach of a contract, if the damages do not necessarily arise from the breach complained of, so as to be implied by law, the plaintiff must specify in his declaration the particular damage he has sustained, or he will not be permitted to give evidence of it.⁹⁶ A purchaser of personalty who has taken possession under a bill of sale purporting to convey title, and who is in the undisputed possession and enjoyment thereof, is not entitled to recover substantial damages based on the breach of the seller's covenant to furnish a good title.⁹⁷

⁹² Reese v. Smith, 12 Mo. 344.

⁹⁵ Jungerman v. Bovee, 19 Cal.

⁹³ Bloch v. Isham, 28 Ind. 37, 92 Am. Dec. 287.

355.

⁹⁶ Bogert v. Burkhalter, 2 Barb.

525.

^{93a} Cal. Civ. Code, § 801, subd. 12.
⁹⁴ Roberts v. Levy, 3 Abb. Pr. (N. S.) 311.

⁹⁷ Barnum v. Cochrane, 143 Cal. 642, 77 Pac. 656.

§ 5783. **Covenant as to use and occupation.**—Restrictions and prohibitions in the use of real property are not favored by law, and the terms of such covenants will be confined to their accepted usage and the intention of the parties. So an agreement to prohibit the drilling for oil by the terms of any deed to certain lands will not be construed to prohibit the leasing of such premises for that purpose.⁹⁸ A covenant that property conveyed is not to be used for business purposes does not run with the land, but is a personal covenant, not binding on the assigns of the covenantor, nor inuring to the benefit of the successors or assigns of the covenantee.⁹⁹ Personal covenants bestowing benefits and imposing restrictions on the use of land, known to a subsequent purchaser from the covenantor, may be enforced in equity against such purchaser.¹⁰⁰ A restrictive liquor covenant in a deed, to be enforceable against a subsequent grantee, must have been brought to his notice, either actual or constructive, and such notice should be pleaded.¹⁰¹

§ 5784. **Stipulation to build.**—Where the lessee stipulated to build a wharf, but specified no particular time, the lessor, before the expiration of the term, could have no legitimate cause of complaint.¹⁰² If the lessee covenants to build on the demised premises within a given time, the covenant is not a continuing covenant, and if he fails to build, the receipt of rent by the lessor accruing after the end of the time given is a waiver of the forfeiture.¹⁰³ A sublessee cannot recover from the lessor the damages accruing on account of a change of street grade.¹⁰⁴

§ 5785. **Alleged nuisance.**—In an action upon a covenant against nuisance, it must be shown what the alleged nuisance is, and how it has injured the complainant.¹⁰⁵

§ 5786. **Damages on former suit.**—Where damages have been recovered in a former action on the same cause, it is proper to

⁹⁸ *Test Oil Co. v. La Tourette*, 19 Okla. 214, 91 Pac. 1025.

⁹⁹ *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 Pac. 308; Cal. Civ. Code, § 1462.

¹⁰⁰ *Hunt v. Jones*, 149 Cal. 297, 86 Pac. 686.

¹⁰¹ *Judd v. Robinson*, 41 Colo. 222, 124 Am. St. Rep. 128, 92 Pac. 724.

¹⁰² *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80.

¹⁰³ *McGlynn v. Moore*, 25 Cal. 384.

¹⁰⁴ *Hoppe v. Rosenberg*, 45 Wash. 568, 88 Pac. 1114.

¹⁰⁵ *Bogert v. Burkhalter*, 2 Barb. 525.

allege that fact, and that damages now sued for accrued since the commencement of the former action.¹⁰⁶

§ 5787. Assigning breach.—In a declaration upon an agreement, by which the lessor stipulated to let a farm, from January 1, 1820, and to remove the former tenants, and that the lessee should have the tenancy and occupation of the farm from that day, free from all hindrance, the assignment of the breach was that, although specially requested on January 1st, the defendant refused and neglected to turn out the former tenant, who was then, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff. Such allegation was held sufficient. To aver plaintiff's readiness and offer, as made on the first day of January, was sufficient. Offer and request need not be averred to have been made at the last convenient hour on the day. Nor need they be averred to have been made on the land.¹⁰⁷

§ 5788. Copy of covenant.—The entire lease need not be set out; only such covenants as relate to the breaches assigned.¹⁰⁸ But where the breach assigned relates to a violation of the obligation arising out of the relation of landlord and tenant, state the hiring, and set out a copy of the lease. The facts out of which the duty or obligation arose ought to be stated.¹⁰⁹

§ 5789. Covenants in leases—Interpretation of.—A covenant in a lease to be renewed indefinitely is in effect the creation of a perpetuity, and is against the policy of law.¹¹⁰ In California, leases of land for agricultural or horticultural purposes for over fifteen years, or of the property of any municipality, or of any minor or incompetent person, for over ten years, or of city lots for over fifty years, where rent of any kind is reserved, are void.¹¹¹ An agreement to lease a building for "one or more years" is sufficiently definite as to the duration of the lease to support a suit for specific performance of the agreement, the term "one or more years," in the absence of any stipulation of

¹⁰⁶ Beckwith v. Griswold, 29 Barb. 291.

¹⁰⁷ Carroll v. Peake, 1 Pet. 18, 7 L. Ed. 34.

¹⁰⁸ Sandford v. Halsey, 2 Denio, 235.

¹⁰⁹ City of Buffalo v. Holloway, 7 P. P. F., Vol. IV—3

N. Y. 493, 57 Am. Dec. 550; City of Buffalo v. Holloway, 14 Barb. 101; Congreve v. Morgan, 4 Duer, 439; Seymour v. Maddox, 16 Q. B. 326, 71 Eng. Com. L. 326.

¹¹⁰ Morrison v. Rossignol, 5 Cal. 65.

¹¹¹ Civ. Code, §§ 717, 718.

option of determination, creating a term of two years.¹¹² Where a lease contains a covenant against assignment, and the restriction is once removed, it operates as a removal forever.¹¹³ A covenant that if the lessor shall sell or dispose of the demised premises, the lessee is to be entitled to the refusal of the same, is a covenant running with the land.¹¹⁴ A description in a lease as "a certain lot of land, etc., together with the improvements thereon, consisting of the dwelling known as the Hotel de France," is not an implied guaranty that the hotel shall remain on the lot during the term.¹¹⁵ Defendant agreed, in writing, to lease plaintiff a certain two-story brick building belonging to defendant, and occupied by a named tenant, the lease to be executed as soon as the tenant vacated the building. Thereafter defendant conveyed the property to his co-defendant, expressly excepting from his warranty the lease "to be executed" thereafter to plaintiff, and the deed fully described the property. In a suit for specific performance, it was held that, construing the agreement to lease in connection with the deed, it sufficiently described the property agreed to be leased.¹¹⁶ A covenant to pay rent quarterly is not a debt until it becomes due; for before that time the lessee may quit with the consent of the lessor, or he may assign his term with his consent, or he may be evicted by a title paramount to that of the lessor.¹¹⁷ A clause in a lease exempting the tenant from liability to restore the house in case of fire, does not relieve from rent in case of such destruction.¹¹⁸

§ 5790. **Damages by the elements.**—Those acts are to be regarded as the acts of God which do not happen through human agency, such as storms, lightnings, and tempests.¹¹⁹ Damages "by the elements" are damages by the act of God.¹²⁰

§ 5791. **Exceptions in covenant to repair.**—In an action on a covenant in a lease to repair, followed by an exception in a distinct clause, the complaint need not notice the exception.¹²¹

112 *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715.

113 *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80.

114 *Laffan v. Naglee*, 9 Cal. 662, 70 Am. Dec. 678.

115 *Branger v. Manciet*, 30 Cal. 624.

116 *Boston Clothing Co. v. Solberg*, 28 Wash. 262, 68 Pac. 715.

117 *Wood v. Partridge*, 11 Mass. 488; cited in *People v. Arguello*, 37 Cal. 524.

118 *Beach v. Farish*, 4 Cal. 339.

119 *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115.

120 *Id.*

121 *Trustees of New Castle Common v. Stevenson*, 1 *Houst. (Del.)* 451.

§ 5792. **Breach of covenant to pay taxes.**—In an action by a lessor for the breach of a covenant by the lessee to pay taxes, it is not essential to the statement of a cause of action that the complaint should specifically allege all the steps necessary to constitute a valid assessment. A general allegation in the complaint showing that the demised premises were assessed for state and county purposes, and the amount of the taxes due thereon, is sufficient, when tested by a general demurrer.¹²²

§ 5793. **Forfeiture.**—If the landlord, after default, accepts the rent, he thereby waives the forfeiture, and cannot afterwards insist upon it, and much less can the tenant be allowed to say that he is discharged from his covenants by his own default in the payment of rent.¹²³ In relation to leases for years, as well as those for life, the happening of the cause of forfeiture only renders the lease void as to the lessee. It may be affirmed as to the lessor, and then the rights and obligations of both parties continue without regard to the forfeiture.¹²⁴ The tenant cannot insist that his own act amounted to a forfeiture. If he could, the consequence would be that in every instance of an action on the covenant for rent, brought on a covenant with a proviso of forfeiture for non-performance, the landlord would be defeated by the tenant showing his own default at a prior period.¹²⁵

§ 5794. **Lease as evidence.**—In California, leases for more than one year must be in writing, but for a less term a verbal lease is sufficient.¹²⁶ In New York, the plaintiff may introduce in evidence a lease not under seal, to prove that the relation of landlord and tenant existed, and what was the rent agreed upon.¹²⁷

§ 5795. **Under-lease.**—One who takes an under-lease is bound by all the covenants in the original lease. Where a lessee sublet part of the premises for a definite term, the owner agreeing to

¹²² *Ellis v. Bradbury*, 75 Cal. 234, 17 Pac. 3.

¹²³ *Belloc v. Davis*, 38 Cal. 250.

¹²⁴ *Clark v. Jones*, 1 Denio, 519, 43 Am. Dec. 706; *Rede v. Farr*, 6 M. & S. 121; *Belloc v. Davis*, 38 Cal. 250.

¹²⁵ *Doe dem. Bryan v. Banks*, 4 Barn. & Ald. 409; cited in *Belloc v. Davis*, 38 Cal. 250; referring also to

Stuyvesant v. Davis, 9 Paige, 427; *Canfield v. Westcott*, 5 Cow. 270; and the distinction drawn between these cases and the case of *Hemp v. Garland*, 4 Q. B. 519; 3 Gale & Davidson, 402; 45 Eng. Com. L. 519.

¹²⁶ Civ. Code, § 1624.

¹²⁷ *Williams v. Sherman*, 7 Wend. 109.

recognize the sublease in case the lessee lost the right to rent the premises, an assignee of the lessee who accepts rent from the sublessee cannot question the validity of the sublease where it is not questioned by the owner.¹²⁸ The sale of spirits in bottles by a grocer is a breach of a covenant that the premises shall not be used "as an inn, public house, or taproom, or for the sale of spirituous liquors."¹²⁹ An under-lease of a whole term amounts to an assignment.¹³⁰ An assignment which purports to be not merely an assignment of the term of a lease, but of the instrument, or "indenture of lease," carries with it an option to purchase contained therein.¹³¹

§ 5796. **Liability of lessees.**—Where a lease provides that in case of a breach of its conditions, and the continuance thereof for ten days, such breach and continuance shall terminate the lease, and it is further stipulated that in such event the improvements and machinery shall inure to and become the property of the lessor, and the mill on the property was burned by failure of the lessee to keep a watchman, as provided in the lease, the lessee is liable for the value of such mill, and cannot relieve himself thereof by turning over to the lessor the ashes and ruined machinery as liquidated damages.¹³²

§ 5797. **Void lease.**—A lease for two years, executed by the lessees and by an agent of the lessors, but who had not written authority to do so, is void.¹³³ Where a clause of renewal in a lease discloses no certain basis for ascertaining the rent to be paid, such clause is void for uncertainty.¹³⁴ So a covenant "to let the lessor have what land he and his brothers might want for cultivation," is void for uncertainty.¹³⁵

§ 5798. **General covenant to repair.**—In the absence of statute or agreement, there is no implied warranty that the lessor will keep the leased property in repair.¹³⁶ Where defendants leased

¹²⁸ Teater v. King, 35 Wash. 138, 76 Pac. 688.

¹²⁹ Feilden v. Slater, L. R., 7 Eq. 523.

¹³⁰ Beardman v. Wilson, L. R., 4 C. P. 57.

¹³¹ Blakeman v. Miller, 136 Cal. 138, 89 Am. St. Rep. 120, 68 Pac. 537.

¹³² Porter v. Allen, 8 Idaho, 358, 69 Pac. 105, 236.

¹³³ Folsom v. Perrin, 2 Cal. 603.

¹³⁴ Morrison v. Rossignol, 5 Cal. 65.

¹³⁵ Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80.

¹³⁶ Landt v. Schneider, 31 Mont. 15, 77 Pac. 307.

a residence, appurtenant to which was a porch bridge over an intervening space between the house and the sidewalk, the lease extended to and included the porch and approaches which were under the exclusive control of the tenant, so that the latter was primarily liable for its repair.¹³⁷ Where a building leased for milling purposes was damaged by fire, and the landlord agreed to repair the premises and rebuild a certain kiln used in the building, if the tenants would rebuild the parts of the machinery damaged, the promise and performance of their promise by the tenants were a sufficient consideration for the promise to rebuild the kiln.¹³⁸ The value of repairs in a lease of a wharf, providing the lessor shall pay the lessee the value of repairs if he is not allowed to remove them, is their value as contained in the wharf, and not what the material, if taken out, would sell for.¹³⁹ If the embankment of a natural reservoir, which is filled with water by unusual rain, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if damages by the elements or acts of Providence are excepted from his covenant.¹⁴⁰ A general covenant to repair is binding upon the tenant under all circumstances, even if the injury is from the act of God or a stranger.¹⁴¹

§ 5799. Implied obligation.—Where an agreement to lease refers to the premises described as a “cold-storage building,” as a description of the place and a designation of its character, and stipulates that its use shall be restricted to such articles as are ordinarily stored for preservation in such place, an implied warranty of fitness for such use arises therefrom.¹⁴² In the absence of statute or agreement, there is no implied warranty that the leased premises are suitable for the purpose for which they are demised.¹⁴³ Defendant entered upon, occupied, and paid rent for premises under a demise for a term of years, made on behalf of a corporation, the owner, but not sealed with the corporate seal. By this agreement defendant undertook to make certain repairs. It was held that he was bound by his stipula-

¹³⁷ Ward v. Hinkleman, 37 Wash. 375, 79 Pac. 956.

¹³⁸ Frey v. Vignier, 145 Cal. 251, 78 Pac. 733.

¹³⁹ Ladd v. Hawkes, 41 Or. 247, 68 Pac. 422.

¹⁴⁰ Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115.

¹⁴¹ Id.

¹⁴² Hunter v. Porter, 10 Idaho, 72, 77 Pac. 434.

¹⁴³ Landt v. Schneider, 31 Mont. 15, 77 Pac. 307.

tion. He had become tenant from year to year, on the terms of the demise applicable to such tenancy.¹⁴⁴

§ 5800. **Joint lessors.**—Where a lease was made by several owners of a house, reserving rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good repair, and surrender them in like repair, this covenant was joint as respects the lessors, and one of them (or two representing one interest) cannot maintain an action for the breach of it by the lessees.¹⁴⁵

§ 5801. **Covenant defined.**—The breach of the covenant for quiet enjoyment is an actual disturbance of possession by reason of some adverse right existing at the time of the making the covenant;¹⁴⁶ not a tortious disturbance, nor a lawful disturbance by an adverse right subsequently acquired.¹⁴⁷ Where a lease contains an express covenant for quiet enjoyment “without molestation or disturbance of or from the lessor, his successor or assigns,” no other or further covenant in respect to enjoyment will be implied.¹⁴⁸ Under the Civil Code of California a covenant for quiet enjoyment against all persons lawfully claiming the same, is implied in all letting for hire.¹⁴⁹

Covenants in a lease providing for its termination, on failure of a lessee to comply with specified conditions, are for the benefit of the lessor only, and the lessee cannot by a breach of its covenants abrogate the lease and thus secure advantage from his own default.¹⁵⁰

§ 5802. **Eviction.**—Without an eviction there is no breach of the covenant for quiet enjoyment; but it is not necessary that the eviction should be by process of law consequent on a judgment. The covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an

¹⁴⁴ Ecclesiastical Commissioners v. Merral, L. R., 4 Exch. 162.

¹⁴⁵ Calvert v. Bradley, 16 How. 580, 14 L. Ed. 1066.

¹⁴⁶ Greenleaf on Evidence, 239.

¹⁴⁷ Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Grannis v. Clark, 8 Cow. 36. As to an entry by the

landlord, see Sedgwick v. Hollenback, 7 Johns. 376.

¹⁴⁸ Burr v. Stenton, 43 N. Y. 462.

¹⁴⁹ Cal. Civ. Code, § 1927. See, also, Edwards v. Perkins, 7 Or. 149.

¹⁵⁰ Brown v. Cairns, 63 Kan. 584, 66 Pac. 639.

irresistible paramount title.¹⁵¹ Mere proof of eviction in a suit in which the warrantor was not a party is no evidence that the eviction was by a paramount title.¹⁵²

§ 5803. **Necessary averments.**—The complaint must state the particulars as to the person or persons who prevented him and by what right, and show a title at or before the date of the lease declared on.¹⁵³

§ 5804. **Responsibility of landlords.**—Upon a covenant in a lease for quiet enjoyment, the lessor is responsible only for his own acts and those of others claiming by title paramount to the lease.¹⁵⁴ In such a covenant no set formula is required. Any language which expresses the intent is sufficient.¹⁵⁵ A lessee who makes a lease knowing that other tenants are in possession, who are to attorn to her, cannot recover from the landlord for gas and water bills overdue when she takes possession, where it does not appear that they are not the personal bills of the other tenants.¹⁵⁶ A tenant, knowing the danger of an open cellar-way cannot recover damages from the landlord, who was under obligation to repair the same; but the tenant could make the repairs and deduct the amount from the rent, or else surrender the premises.¹⁵⁷ A landlord attempting to remodel a building must do so without injury to his tenants therein.¹⁵⁸

§ 5805. **Defenses.**—Under a plea of *non est factum* to an action of covenant, it is competent to show a variance between the deed offered in evidence and that declared on.¹⁵⁹ That plaintiff gave no notice and no opportunity to perfect the title is a good

¹⁵¹ McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456.

¹⁵² Baumgarten v. Chipman, 30 Utah, 466, 86 Pac. 411.

¹⁵³ Grannis v. Clark, 8 Cow. 36.

¹⁵⁴ Playter v. Cunningham, 21 Cal. 229.

¹⁵⁵ Levitzky v. Canning, 33 Cal. 299.

¹⁵⁶ Hobson v. Silva, 137 Cal. xix, 70 Pac. 619.

¹⁵⁷ Reams v. Taylor, 31 Utah, 288, 120 Am. St. Rep. 930, 87 Pac. 1089; Brett v. Berger, 4 Cal. App. 12, 87 Pac. 222.

¹⁵⁸ Bancroft v. Godwin, 41 Wash. 253, 83 Pac. 189.

¹⁵⁹ Treat v. Brush, 11 Mo. 310. As to what defenses are admissible in actions of covenants, see Wilder v. Adams, 2 Woodb. & M. 329, Fed. Cas. No. 17647; United States v. Clarke, Hempst. 315, Fed. Cas. No. 14812; Gill v. Patton, 1 Cranch C. C. 143, Fed. Cas. No. 5429; Wise's Exr. v. Resler's Exr., 2 Cranch C. C. 182, Fed. Cas. No. 17911 Scott v. Lunt, 3 Cranch C. C. 285, Fed. Cas. No. 12540; Kurtz v. Becker, 5 Cranch C. C. 671, Fed. Cas. No. 7915.

defense.¹⁶⁰ Notice or knowledge of the defect, at the time of taking possession under a lease is a good defense.¹⁶¹

§ 5806. **Defense—Assignment.**—A plea alleging an assignment of a covenant to pay rent by the plaintiff to a third person should aver the form of the assignment, whether verbal or in writing.¹⁶²

§ 5807. **Defense—Counterclaim.**—In an action at law to recover damages for failure to comply with the covenant to indemnify plaintiff against liabilities, the defendant cannot set up as a counterclaim demands which were matters of partnership between the parties.¹⁶³

§ 5808. **Defense—Performance.**—Where the plaintiff has assigned a particular breach, a general plea of performance, pursuing the words of the contract, is bad.¹⁶⁴ Performance must be set forth with such certainty as to enable the court to judge whether the intent of the covenant has been fulfilled—e. g. the defendant should aver, not that he sold, but that he conveyed, setting forth the nature of the conveyance.¹⁶⁵ In Pennsylvania, the defendant may plead performance, with leave to give in evidence anything which amounts to a legal defense, and may introduce such evidence without notice of the real defense he intends to set up.¹⁶⁶ Where the terms of an agreement do not limit the time within which it is to be performed, the law implies that it is to be performed immediately, or, at most, within a reasonable time.¹⁶⁷

¹⁶⁰ *Menasha Wooden Ware Co. v. Nelson*, 45 Wash. 543, 88 Pac. 1018.

¹⁶¹ *Hatch v. McCloud River Lumber Co.*, 150 Cal. 111, 88 Pac. 355.

¹⁶² *Thomas v. Cox*, 6 Mo. 506.

¹⁶³ *Haskell v. Moore*, 29 Cal. 437.

¹⁶⁴ *Bradley v. Osterhoudt*, 13 Johns. 404; *Beach v. Barrons*, 13 Barb. 305.

¹⁶⁵ *Thomas v. Van Ness*, 4 Wend. 549.

¹⁶⁶ *Webster v. Warren*, 2 Wash. C. 456, Fed. Cas. No. 17339. Compare *Gill v. Patton*, 1 Cranch C. C. 143, Fed. Cas. No. 5429.

¹⁶⁷ *Brennan v. Ford*, 46 Cal. 7. As to pleading in action for breach of covenant, see *Woolley v. Newcombe*, 87 N. Y. 605.

FORMS—ACTIONS ON COVENANTS.

§ 5809. Complaint for breach of warranty of title to real property.

Form No. 1639.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant, in consideration of . . . dollars to him paid, granted to the plaintiff, by deed [here insert description], and in his said deed warranted that he had good title in fee simple to the said property, and would defend the plaintiff in his possession of the same.

II. That the defendant was not, but one A. B. was then the lawful owner of the said lands, in fee simple.

III. That on the . . . day of . . . , 19.., the said A. B. lawfully evicted the plaintiff from the same, and still withholds the possession thereof from him.

[DEMAND OF JUDGMENT.]

§ 5810. Eviction, allegation of.

Form No. 1640.

That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, one C. D. lawfully claimed the same premises by a paramount title, and afterwards, in an action brought by him in the superior court of the county of . . . , state aforesaid, in which said C. D. was plaintiff, and this plaintiff was defendant, the said C. D., on the . . . day of . . . , 19.., recovered judgment, which was duly given by said court against this plaintiff, for his seisin and possession of the premises, and on the . . . day of . . . , 19.., lawfully entered the premises, and ousted the plaintiff therefrom, and still lawfully holds the plaintiff out of the possession thereof.

§ 5811. Special damages, allegation of.

Form No. 1641.

That by reason thereof the plaintiff has not only lost said premises, but also the sum of . . . dollars, by him laid out and expended in and upon the said premises, in repairing and improving the same, and also the sum of . . . dollars, costs and

charges sustained by the said A. B., in prosecuting his action for the recovery thereof, and the sum of . . . dollars, for his own costs, charges, and counsel fees in defending said action.

**§ 5812. Complaint for breach of covenant of warranty—
Another form.**

Form No. 1642.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant, by his deed of that date, duly executed, in consideration of . . . dollars, sold and conveyed in fee simple, to the plaintiff, certain land [describe it].

II. That the defendant, by the same deed, covenanted as follows: [Copy of covenant.]

III. That the defendant had not at the time of the execution of said deed a good and sufficient title to said premises, and by reason thereof, on the . . . day of . . . , 19.., at . . . , the plaintiff was ousted and dispossessed of the said premises by due course of law.

[Or, III. That one G. H., at the time of the execution of the said deed and from thence, had lawful right and paramount title to the said premises, and by virtue thereof, after the execution of said deed, on the . . . day of . . . , 19.., entered upon the possession thereof, and ousted and dispossessed by due process of law, and kept, and still keeps, the plaintiff from the possession of the same. That the plaintiff has also been compelled to pay the costs and charges sustained by the said G. H., in prosecuting a certain action in the . . . court, in . . . county, for the recovery of said premises, which amounted to . . . dollars, and to pay out the additional sum of . . . dollars in endeavoring to defend such action.]

[DEMAND OF JUDGMENT.]

§ 5813. Complaint by assignee of grantee against previous grantor.

Form No. 1643.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale to one C. D.]

II. [Allege and set out copy of covenant.]

III. That the said C. D. afterwards, on the . . . day of . . . , 19.., at . . . , by deed duly executed, in consideration of the sum of . . . dollars, conveyed the said premises to one E. F., his heirs and assigns; and the said E. F. afterwards, on the . . . day of . . . , 19.., at . . . , by his deed of that date, duly executed, in consideration of the sum of . . . dollars, conveyed the same premises to the plaintiff.

IV. That the plaintiff afterwards, on the . . . day of . . . , 19.., at . . . , entered into and was possessed of said premises.

V. That the defendant had not at the time of the execution of his said deed, nor has he since had, a good and sufficient title to the said premises; by reason whereof the plaintiff was afterwards, on the . . . day of . . . , 19.., ousted and dispossessed of the said premises by due course of law.

[DEMAND OF JUDGMENT.]

§ 5814. Complaint by heirs of covenantee against previous grantor.

Form No. 1644.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege sale as in preceding forms.]

II. [Allege and set out copy of covenant.]

III. That the said C. D. afterwards, and on the same day, entered into and was possessed of said premises, and afterwards, on the . . . day of . . . , 19.., at . . . , said C. D. died, whereupon the said premises, and his estate therein, descended to the plaintiffs, as children and co-heirs of the said C. D., deceased; and that they afterwards, on the same day, entered into and were possessed of said premises, until ousted and dispossessed, as hereinafter mentioned.

[Here set forth the breach, etc., as in the preceding forms.]

[DEMAND OF JUDGMENT.]

§ 5815. Complaint by devisee of covenantee, against previous grantor.

Form No. 1645.

[TITLE.]

The plaintiff complains, and alleges:

I. and II. [Allege sale and covenant.]

III. That the said E. F., afterwards, and on the same day, entered into and was possessed of said premises; and afterwards,

on the . . . day of . . . , 19.., at . . . , made his last will and testament, in writing, and thereby, amongst other things, devised the said premises to the plaintiff; and afterwards, on the . . . day of . . . , 19.., at . . . , the said E. F. died, leaving such will.

IV. That on the . . . day of . . . , 19.., the said will was proved and admitted to probate in the probate court of [etc.], and by order of said court, letters testamentary were issued. [If the property is situated in a county other than the one where the will was admitted to probate, add: That afterwards, on the . . . day of . . . , 19.., by an order of the probate court of . . . county (where the premises are situated), an authenticated copy of said will, from the record aforesaid, with a copy of said order of probate annexed thereto, was filed of record in the probate court of said county of . . . (where premises lie), and duly recorded.]

V. That thereupon the plaintiff entered into possession of the said premises, and was possessed thereof until ousted and dispossessed as hereinafter mentioned. [Set forth breach, etc., as in preceding forms.]

[DEMAND OF JUDGMENT.]

§ 5816. Complaint for breach of warranty as to quantity.

Form No. 1646.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant warranted a certain farm in . . . township, . . . county, state of . . . , to contain . . . acres of land, and thereby induced the plaintiff to purchase the same from him, and pay to him . . . dollars therefor.

II. That the said farm contained only . . . acres, instead of . . . acres, the quantity sold to plaintiff by defendant.

III. That plaintiff was damaged thereby in the amount of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5817. Complaint in action on covenant against incumbrances on real property.

Form No. 1647.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19. . . , at . . . , the defendant, in consideration of . . . dollars, to him paid, granted to the plaintiff by deed, in fee simple, a farm in the town of . . . , county of . . . [or otherwise briefly designate the property].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [Copy of covenant.]

III. That at the time of the making and delivery of said deed the premises were not free from all incumbrance, but on the contrary, the defendant before that time, on the . . . day of . . . , 19. . . , at . . . , by deed in the nature of a mortgage, duly executed, had mortgaged the said premises to one R. S., to secure the payment of . . . dollars, with interest.

IV. And for a further breach, the plaintiff alleges, that on the . . . day of . . . , 19. . . , in the . . . court of the . . . judicial district of . . . county, in this state, judgment was rendered against the defendant for the sum of . . . dollars, in an action in which the said [incumbrancer] was plaintiff, and the defendant herein was defendant, which judgment was, on the . . . day of . . . , 19. . . , docketed in said county of [where premises are situated] and which judgment at the time of the execution and delivery of the deed in the nature of a mortgage, remained unpaid and unsatisfied of record.

V. And for a further breach, the plaintiff alleges that at the time of the execution and delivery of said deed the premises were subject to a tax theretofore duly assessed, charged and levied upon the said premises by the said city of . . . , and the officers thereof, of the sum of . . . dollars, and which tax was then remaining due and unpaid, and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises.

VI. That by reason thereof the plaintiff paid, on the . . . day of . . . , 19. . . , the sum of . . . dollars in extinguishing the [here state what, whether the judgment, lien, tax or other incumbrances, or all of them] aforesaid, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5818. The same—Where the deed expressed specific incumbrance.

Form No. 1648.

[TITLE.]

The plaintiff complains, and alleges:

I. [As in preceding form.]

II. That by said deed the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage recorded in the recorder's office at . . . , on the . . . day of . . . , 19.. , in book A of mortgages, [or other incumbrance, describing it], and no other incumbrances were mentioned or specified in said deed, as existing upon or affecting said premises or the title thereto.

III. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [Copy of covenant.]

IV. That at the time of the making and delivery of the said deed, the premises were not free from all incumbrances other than the mortgage therein excepted, but, on the contrary, [here set out any or all other incumbrances as breaches, and conclude as in preceding form].

[DEMAND OF JUDGMENT.]

§ 5819. Complaint in action on covenant of seisin, or of power to convey.

Form No. 1649.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant, for a valuable consideration, by deed, conveyed to the plaintiff in fee simple [describe the property].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [Copy of covenant.]

III. That at the time of the execution and delivery of said deed, the defendant was not the true, lawful, and rightful owner, and had not in himself at said time good right, full power, etc. [negative the words of the covenant].

IV. Whereby the plaintiff has sustained damages in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5820. Complaint in action on grantee's covenant to build.

Form No. 1650.

[TITLE.]

The plaintiff complains, and alleges:

I. That in consideration that the plaintiff would sell and convey to the defendant a lot of land [describe it], for the sum of

. . . dollars, the defendant, on the . . . day of . . . , 19. . . , agreed that he would erect upon the premises a good brick house, to be occupied as a dwelling, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

II. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum, but the defendant has not erected a good brick house on the lot, to be occupied as a dwelling; but, on the contrary, has erected upon said premises a wooden building, to be used as a slaughterhouse.

III. That the defendant thereby has prevented other lots in the vicinity, owned by the plaintiff, from becoming valuable to the plaintiff, as they would otherwise have become, and has injuriously affected their condition, and hindered the plaintiff from selling them; to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

**§ 5821. Complaint in action on covenant against nuisances—
By grantor against grantee.**

Form No. 1651.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19. . . , at . . . , the plaintiff, by his deed, conveyed to the defendant, for a valuable consideration, as well as in consideration of the covenant hereinafter mentioned, a lot of land.

II. That said deed contained a covenant on the part of the defendant, the grantee therein, of which the following is a copy: [Copy of covenant against nuisances.]

III. That said deed was delivered by the plaintiff, and by the defendant duly accepted.

IV. That the defendant has erected, and suffered and permitted to be erected, on said premises, a building occupied and used as a slaughterhouse.

V. That the offal and blood in and carried out from said slaughterhouse, and the offensive smell created thereby, is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5822. Complaint in action on continuing covenant to maintain fence.

Form No. 1652.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the plaintiff and defendant then were the owners of lands adjoining, and then made an agreement in writing, under their hands and seals, of which the following is a copy: [Copy of agreement.]

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That the defendant did not, after the erection of said fence, maintain the same and keep it in continual repair, but on the contrary, in the month of . . . , 19.., he suffered the same to become dilapidated and broken down, and to remain in that condition from that time until the . . . day of . . . , 19..

IV. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit trees, by cattle coming through said dilapidated fence from the defendant's land upon the plaintiff's premises; and that plaintiff was compelled to repair and rebuild said fence, in order to protect his land from the damage caused by said cattle, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5823. Complaint by lessor against lessee, on covenant to keep premises in repair.

Form No. 1653.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., by a lease in writing under their hands and seals, the plaintiff leased to the defendant, and the defendant rented from the plaintiff for one year from said date, at a monthly rent of . . . dollars, a certain dwelling-house in . . . , in the county of . . . , the property of the plaintiff.

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [Copy of covenant.]

III. That the defendant entered upon the premises and occupied the same during the said term of one year, under said agree-

ment; but that he has failed to keep the said house and premises in good repair; but, on the contrary, [state injuries to premises], and the house and premises are otherwise injured by reason of the neglect of the defendant to keep them in good repair, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5824. Complaint by lessee against lessor, for not keeping premises in repair.

Form No. 1654.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , by a lease made between the plaintiff and the defendant, under their hands and seals, the defendant leased to the plaintiff, and the plaintiff rented from the defendant, the premises known as No. . . . , . . . street, in . . . , for . . . months from that date, at the monthly rent of . . . dollars.

II. That said lease contained a covenant on the part of defendant, of which the following is a copy: [Copy of covenant.]

III. That the plaintiff entered into possession of said premises under said lease, and used the same as a warehouse for storing various articles of merchandise.

IV. That the defendant has failed to keep the premises in repair, and has allowed [state neglect and special damage caused thereby], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5825. Complaint by lessee against lessor, for not completing building according to agreement.

Form No. 1655.

[TITLE.]

The plaintiffs complain and allege:

I. That on the . . . day of . . . , 19.. , at . . . , the plaintiffs, under the firm name of A. B. & Co., and the defendants, under the firm name of C. D. & Co., entered into an agreement in writing, of which agreement the following is a copy: [Copy of agreement to complete unfinished store, similar to adjoining store.]

II. That after the making of said agreement, and on the . . . day of . . . , 19.. , the defendants delivered, and the plaintiffs took possession of, said building, under and in pursuance of

said agreement, and upon the faith and assurance of the defendants, and the full belief thereof that the said premises were finished in the same manner as the adjoining store, and in accordance with the terms of said agreement.

III. That the said premises were not finished in the same manner as the store adjoining at the time of making such agreement, but, on the contrary, [allege specifically the difference].

IV. [Allege special damages], to the damage of the plaintiffs in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 5826. Complaint for breach of covenant of quiet enjoyment against landlord.

Form No. 1656.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , at . . . , the defendant, by deed [or, lease under seal], let to the plaintiff, and the plaintiff rented from the defendant, the house numbered . . . , . . . street, . . . , for the term of three years, covenanting that the plaintiff should quietly enjoy possession thereof for the said term.

II. That on [etc.], one A. B., who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

III. That the plaintiff was thereby prevented from continuing the business of [merchandising] at the said place, and was compelled to expend . . . dollars in moving, and lost the custom of C. D., E. F., and G. H., and divers other persons, by such removal.

[DEMAND OF JUDGMENT.]

§ 5827. Denial of covenant.

Form No. 1657.

[TITLE.]

The defendant answers to the complaint:

That he did not covenant or agree with the plaintiff as alleged, or at all.

§ 5828. Denial of breach.

Form No. 1658.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the defendant duly performed said covenant [or all the conditions of said contract] on his part; and [here state performance, pursuing the words of the covenant, if it be in the affirmative; and stating particular acts, if it be done in the alternative, in any case where this can be done without too great prolixity].

5829. Denial of offer to perform.

Form No. 1659.

[TITLE.]

The defendant answers to the complaint:

I. That at the time fixed by the agreement referred to in the complaint, the plaintiff was not ready or willing, or in a condition, to receive the merchandise mentioned in the said agreement [or any part thereof].

CHAPTER CXXXVII.

FORECLOSURE OF MORTGAGE ON REAL PROPERTY.

§ 5830. **Mortgage defined.**—Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.¹ It may be created upon property held adversely to the mortgagor,² or upon property and title not yet acquired,³ unless it be a quitclaim mortgage,⁴ or unless such rule would work manifest injustice.⁵ A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property.⁶ It is a lien upon everything which would pass by a grant of the property.⁷ It is not a personal obligation;⁸ and the assignment of a debt secured by a mortgage carries with it the security.⁹

§ 5831. **Mortgage a mere security.**—A mortgage is a mere security for the payment of money or the performance of some other act, the interest passing to the mortgagee being regarded as a lien upon the real estate. It passes no interest or estate in the land except the lien, and the lien is an incident to the debt or the obligation which is thereby secured.¹⁰ The definition of a mortgage, as known at common law, an estate defeasible by the performance of a condition subsequent, does not correctly describe that instrument as it is interpreted in California and most of the other states.¹¹ This doctrine is sustained by a decided preponderance of authority;¹² and is established in California by statute.¹³ An oral agreement to make a mortgage security for advances to be made is void, under section 2922 of the Civil

¹ Cal. Civ. Code, § 2920.

² Cal. Civ. Code, § 2921.

³ Cal. Civ. Code, § 2930; *Sherman v. McCarthy*, 57 Cal. 507; *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693.

⁴ *McDonald v. McCoy*, 121 Cal. 55, 53 Pac. 421.

⁵ *Hawkins v. Harlan*, 68 Cal. 236, 9 Pac. 108.

⁶ Cal. Civ. Code, § 2922.

⁷ Cal. Civ. Code, § 2926.

⁸ Cal. Civ. Code, § 2928.

⁹ Cal. Civ. Code, § 2936.

¹⁰ *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Mueller v. Renkes*, 31 Mont. 100, 77 Pac. 512; *Kaston v. Storey*, 47 Or. 150, 114 Am. Rep. 912, 80 Pac. 217.

¹¹ *Jackson v. Lodge*, 36 Cal. 28.

¹² *Coles v. Coles*, 15 Johns. 319; *Lane v. Shears*, 1 Wend. 433.

¹³ Cal. Code Civ. Proc., § 744; and see *Wenzel v. Schultz*, 100 Cal. 250, 34 Pac. 696; *Toby v. Oregon Pacific Railroad Co.*, 98 Cal. 490, 33 Pac. 550.

Code.¹⁴ That a deed absolute on its face may be proved to have been intended only as a mortgage is settled in California;¹⁵ but an absolute deed, although shown by parol evidence to have been intended as a mortgage, conveys the legal title.¹⁶

§ 5832. Deed as mortgage.—Parol evidence is admissible at law, as well as in equity, to show that a deed, absolute on its face, was given as a security for money, and is in fact a mortgage,¹⁷ except as against a subsequent purchaser or incumbrancer for value and without notice.¹⁸ But if the condition of defeasance be recorded, the deed absolute on its face becomes a mortgage, affecting all persons as such from the date of its recordation.¹⁹

A deed executed by a debtor to a partner, to secure an indebtedness to the firm, is a mortgage.²⁰ If two absolute deeds are passed back and forth between grantor and grantee, the second deed purporting to reconvey the land upon payment of certain money, both must be construed as one—the first as a conveyance of title, and the second as a mortgage, which must be foreclosed to make it absolute.²¹ The test is whether there is a subsisting debt or duty to be performed after the conveyance.²²

A party advancing money for the purchase of real estate for another, but taking title in himself as security for the money advanced, is a mortgagee.²³ Such a deed is not authorized to be recorded in the mortgage records.²⁴

§ 5833. Deed of trust versus mortgage.—The distinction between a deed of trust and a mortgage is that the former

¹⁴ Eikelman v. Perdew, 140 Cal. 687, 74 Pac. 291.

¹⁵ Vance v. Lincoln, 38 Cal. 586.

¹⁶ Hughes v. Davis, 40 Cal. 117.

¹⁷ Jackson v. Lodge, 36 Cal. 28; Vance v. Lincoln, 38 Cal. 586; and see Mahoney v. Bostwick, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020; Locke v. Moulton, 96 Cal. 21, 30 Pac. 957; Perot v. Cooper, 17 Colo. 80, 31 Am. St. Rep. 258, 28 Pac. 391.

¹⁸ Cal. Civ. Code, §§ 2924, 2925.

¹⁹ Cal. Civ. Code, § 2950; Malone v. Roy, 134 Cal. 344, 66 Pac. 313.

²⁰ Banta v. Wise, 135 Cal. 277, 67 Pac. 129.

²¹ Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712; Booth v. Hoskins, 75 Cal. 271, 17 Pac. 225; Kelly v. Leashman, 3 Idaho, 392, 29 Pac. 849; Bunker v. Barron, 79 Me. 62, 1 Am. St. Rep. 282, 8 Atl. 253.

²² Holmes v. Warren, 145 Cal. 457, 78 Pac. 954; Morrison v. Jones, 31 Mont. 154, 77 Pac. 507.

²³ Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305.

²⁴ Cal. Civ. Code, § 1171; Kent v. Williams, 146 Cal. 3, 79 Pac. 527.

empowers the trustee to sell upon default, and equity relief consists not in foreclosure, but of enforcement of the trust, and no equity of redemption exists if the trust is performed.²⁵ Equity supervises sales under powers, either in trust-deeds or mortgages, and will restrict them in such mode as to do justice to all the parties,²⁶ giving them strict construction.²⁷

§ 5834. **Possession of the premises.**—A mortgagee, in the absence of a specific agreement to the contrary, is not entitled to possession as against a mortgagor, though the instrument be on its face an absolute deed;²⁸ and a mortgagee in possession is not entitled to compensation for care of the property;²⁹ nor has he, prior to foreclosure, any right to sell nursery stock which is regarded as a part of the mortgaged realty.³⁰

§ 5835. **Burden of proof.**—If there is doubt as to whether an instrument was intended as a mortgage or a deed of trust, it should be considered as a mortgage with power of sale;³¹ but as to a deed absolute on its face, the burden of proof is on the party claiming it to be a mortgage,³² and he should furnish clear and satisfactory proof.³³ The subsequent action of the mortgagee in referring to the instrument in a release as a mortgage is competent evidence,³⁴ as is also parol testimony,³⁵ or an assignment of a judgment against plaintiff to defendant prior to the deed,³⁶ or a receipt from grantor to grantee for money, which stated it to be a final payment in purchase of land, as per the deed in question.³⁷ Attaching creditors claiming fraudulent representations of the mortgagee as to the debtor's financial condition have the burden of proving the fraud.³⁸

25 Koch v. Briggs, 14 Cal. 257, 73 Am. Dec. 651; Powell v. Patison, 100 Cal. 234, 34 Pac. 676; Banta v. Wise, 135 Cal. 277, 67 Pac. 129.

26 More v. Calkins, 85 Cal. 177, 24 Pac. 729.

27 Savings & Loan Soc. v. Burnett, 106 Cal. 514, 39 Pac. 922.

28 Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810.

29 Moss v. Odell, 141 Cal. 335, 74 Pac. 999.

30 Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067.

31 Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761.

32 Bryant v. Broadwell, 140 Cal. 490, 74 Pac. 33.

33 Emery v. Lowe, 140 Cal. 379, 73 Pac. 981.

34 Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

35 Yingling v. Redwine, 12 Okla. 64, 69 Pac. 810; Ross v. Howard, 31 Wash. 393, 72 Pac. 74.

36 Rees v. Rhodes, 3 Ariz. 235, 73 Pac. 446.

37 Holmes v. Warren, 145 Cal. 457, 78 Pac. 954.

38 Chittenden v. Sieg Mfg. Co., 16 Colo. App. 549, 66 Pac. 1077.

§ 5836. **Bond for title, a mortgage.**—At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity rests in the vendee, to have the title in compliance with the conditions; and the legal title and equity go to the whole estate, including fixtures. The vendor can bring an action in ejectment on breach of condition, or foreclosure.³⁹ The same rule applies under the codes, and is considered as a mortgage, subject to foreclosure, instead of a conditional sale.⁴⁰ But if a deed to property is accepted on agreement to reconvey, upon payment of a certain sum by a certain time, but the payment of such money is not made binding, but upon failure to pay the agreement to reconvey is to become null and void, time being of the essence of the agreement, it is a conditional sale, and not a mortgage.⁴¹

§ 5837. **Pledge or mortgage.**—A transfer of interest in property, other than in trust, as security, is always a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is a pledge.⁴²

§ 5838. **What real property may be mortgaged.**—Any interest in real property capable of transfer may be mortgaged.⁴³ That interest which cannot be mortgaged or transferred is a mere possibility, not coupled with an interest.⁴⁴ A right of re-entry, or of repossession for breach of condition subsequent, may be transferred;⁴⁵ and the fact that another holds adversely is no bar to transferring⁴⁶ or mortgaging the same.⁴⁷

§ 5839. **Assignment of the land.**—An assignment by the mortgagee of all his interest in the land passes nothing unless the debt be assigned, the mortgage being a mere incident to the debt.⁴⁸ A mortgage of real property shall not be deemed a con-

³⁹ Merritt v. Judd, 14 Cal. 59.

⁴⁰ Borchardt v. Favor, 16 Colo. App. 406, 66 Pac. 251; Yost v. First Nat. Bank, 66 Kan. 605, 72 Pac. 209.

⁴¹ Smyth v. Reed, 28 Utah, 262, 78 Pac. 478.

⁴² Cal. Civ. Code, § 2924.

⁴³ Cal. Civ. Code, § 2947. See, also, Cal. Civ. Code, § 1044.

⁴⁴ Cal. Civ. Code, § 1045.

⁴⁵ Cal. Civ. Code, § 1046.

⁴⁶ Cal. Civ. Code, § 1047.

⁴⁷ Cal. Civ. Code, § 2921.

⁴⁸ Nagle v. Macy, 9 Cal. 428; Mack v. Wetzler, 39 Cal. 247; Storeh v. McCain, 85 Cal. 304, 24 Pac. 639; Adler v. Sargent, 109 Cal. 42, 41 Pac. 799; Jackson v. Bronson, 19 Johns. 325; Ellison v. Daniels, 11 N. H. 274.

veyance, whatever its terms, so as to enable the mortgagee to recover possession without foreclosure and sale.⁴⁹

§ 5840. Attorneys' fees.—In California, in all cases of foreclosure of mortgage, the attorney's fee shall be fixed by the trial court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding.⁵⁰ If there is no provision in the mortgage for payment of counsel fees, the plaintiff in an action to foreclose is not entitled to such fees.⁵¹ The attorney's fee, as part of the costs and obligations of the mortgage, is a lien on the property.⁵² But if the mortgage provides for the attorney's fee on foreclosure, and does not provide that it shall be secured by the mortgage, it is a personal judgment, but not a lien upon the land.⁵³ A plaintiff who appears in person is not entitled to counsel fees, though stipulated for in the mortgage.⁵⁴ In the foreclosure of a mortgage against the property of a deceased person no counsel fees are allowed unless the claim secured by the mortgage has been first presented to the executor or administrator.⁵⁵

In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees, not exceeding five per cent of the amount due, it is not necessary to aver in the complaint that five per cent was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause of action, but, like costs, a mere incident to it, and might be fixed by the court at its discretion, not exceeding the five per cent.⁵⁶ But attorney's fees cannot be recovered where the

⁴⁹ Cal. Code Civ. Proc., § 744; Civ. Code, § 2927. See *Smith v. Smith*, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549; *Pueblo R. R. Co. v. Beshoar*, 8 Colo. 32, 5 Pac. 639; *Watson v. Dundee* etc. Inv. Co., 12 Or. 474, 8 Pac. 548; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375; *Fender v. Robinson*, 132 Cal. 26, 66 Pac. 969.

⁵⁰ Cal. Code Civ. Proc., § 726.

⁵¹ *Sichel v. Carrillo*, 42 Cal. 494.

⁵² *Haensel v. Pac. St. S. & L. B. Co.*, 135 Cal. 41, 67 Pac. 38; *Corson v. McDonald*, 3 Cal. App. 412, 85 Pac. 861.

⁵³ *Loewenthal v. Coonan*, 135 Cal. 381, 87 Am. St. Rep. 115, 67 Pac. 324. See, also, 68 Pac. 303; *Luddy v.*

Pavkovich, 137 Cal. 284, 70 Pac. 177.

⁵⁴ *Patterson v. Donner*, 48 Cal. 380.

⁵⁵ Cal. Code Civ. Proc., § 1500. See, generally, as to the allowance of counsel fees, *Monroe v. Fohl*, 72 Cal. 568, 14 Pac. 514; *Alden v. Pryal*, 60 Cal. 215; *Hewitt v. Dean*, 91 Cal. 5, 27 Pac. 423; *Lammon v. Austin*, 6 Wash. 199, 33 Pac. 355; *Avery v. Maude*, 112 Cal. 565, 44 Pac. 1020.

⁵⁶ *Carriere v. Minturn*, 5 Cal. 435; *Gronfier v. Minturn*, 5 Cal. 492; *Monroe v. Fohl*, 72 Cal. 571, 14 Pac. 514; *First Nat. Bank v. Holt*, 87 Cal. 158, 25 Pac. 272. See *Hewitt v. Dean*, 91 Cal. 617, 25 Am. St. Rep. 227, 28 Pac. 93.

agreement to pay them is not directly averred in the complaint, but is merely inferable from an exhibit annexed thereto.⁵⁷ Evidence as to employment and value of services of counsel need not be given where the complaint alleges that a certain sum is reasonable, though denied by the answer; but if given, it cannot be ignored by the court.⁵⁸ The duty of fixing compensation is upon the court, within the limits of the contract of mortgage.⁵⁹

§ 5841. **Conditions in mortgage.**—The usual conditions in a mortgage contain no personal obligation to pay the money. The contract is simply that the mortgagor may pay the sum named, which will revest the title in him; or if he fail to do it, then the deed becomes absolute at law, though in equity he still has a right to redeem, which right may be cut off by a foreclosure. In such cases the mortgagee is limited to the land for payment, and if that is not sufficient, he has no further security.⁶⁰

If a deed is taken in place of a mortgage, with idea that it need not be foreclosed, an attorney's fee cannot be allowed, though the mortgage made provision for such a fee.⁶¹ The agreement for attorney fees need not be in the note which the mortgage secures.⁶² The fees form part of the judgment, and where they have not been paid to the attorney they go to the mortgagee, in trust for the attorney.⁶³ One thousand dollars on a mortgage of eleven thousand dollars is held not to be an excessive fee.⁶⁴

§ 5842. **Priority of liens.**—The renewal of a note secured by a mortgage in form of an absolute deed continues the mortgagee's right to a priority over subsequent creditors.⁶⁵ When the promise of renewal of a debt is made after the statute of limitations has run, then it constitutes a new cause of action, which must be sued on as such, and does not renew or extend the mortgage;

⁵⁷ Lee v. McCarthy (Cal.), 35 Pac. 1034; Boob v. Hall, 107 Cal. 160, 40 Pac. 117. See Avery v. Maude, 112 Cal. 565, 44 Pac. 1020; Ames v. Bigelow, 15 Wash. 532, 46 Pac. 1046.

⁵⁸ Wright v. Conservative Inv. Co., 49 Or. 177, 89 Pac. 387.

⁵⁹ Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 2, 542; Damon v. Quinn, 143 Cal. 75, 76 Pac. 818; Hellier v. Russell, 136 Cal. 143, 68 Pac. 581.

⁶⁰ Drummond v. Richards, 2 Munf. 337; 4 Kent Com. 137; Nash's Ohio Pl. & Pr. 347.

⁶¹ Kyle v. Hamilton, 136 Cal. xix, 68 Pac. 484.

⁶² Hellier v. Russell, 136 Cal. 143, 68 Pac. 581.

⁶³ Looibourrow v. Hicks, 24 Utah, 49, 66 Pac. 602, 55 L. R. A. 874.

⁶⁴ Jones v. Stoddart, 8 Idaho, 210, 67 Pac. 650.

⁶⁵ Newhall v. Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673.

but when the acknowledgment is made before the statute has run, and while the debt is still alive, then the original obligation is the cause of action, and carries with it the mortgage given to secure it.⁶⁶ The taking of a new note with an extension of time in place of one secured by a mortgage does not impair the security of the mortgage against subsequent incumbrances, if it was not the intention of the parties to thereby extinguish the old debt.⁶⁷

A purchaser subsequent to a release of a mortgage by an attorney in fact, whose power is not of record, nevertheless purchases at his peril.⁶⁸ The fact that a second mortgage recites its subjection to a first mortgage does not prevent its priority, if the first mortgage is for some reason canceled.⁶⁹ The burden is upon an attaching creditor who tries to get priority over a mortgage on the grounds that the mortgagee made fraudulent representations as to the mortgagor debtor's financial condition.⁷⁰

§ 5843. **Extension of mortgage lien.**—A mortgagor who retains his ownership of the mortgaged premises may make a valid contract of extension of the original mortgage, which will be binding upon a subsequent grantee, whether he takes with or without notice of such extension.⁷¹

The acceptance of a new mortgage and note as a renewal of a former mortgage and note, or in substitution thereof, does not of itself operate as an extinguishment or discharge of the former.⁷²

If a mortgage of record upon which the statute of limitations has run has not been discharged, a renewal of the note will renew the mortgage; and it is the duty of a subsequent purchaser to ascertain, from inquiry of the mortgagee, whether the note has in fact been renewed. If the mortgagee then represents that the note has not been renewed, and the inquirer buys upon such representation, the mortgage cannot be enforced against such purchaser.⁷³

⁶⁶ Southern Pacific Co. v. Prosser, 122 Cal. 413, 55 Pac. 145.

⁶⁷ First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

⁶⁸ Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

⁶⁹ Atchison Sav. Bank v. Wyman, 65 Kan. 314, 69 Pac. 326.

⁷⁰ Chittenden v. C. H. Sieg Mfg. Co., 16 Colo. App. 549, 66 Pac. 1077.

⁷¹ White v. Krutz, 37 Wash. 34, 79 Pac. 495; First Nat. Bank v. Citizens' State Bank, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

⁷² White v. Stevenson, 144 Cal. 104, 77 Pac. 828.

⁷³ Lent v. Morrill, 25 Cal. 492;

§ 5844. **Liability of purchaser.**—If the amount of a mortgage debt is deducted from the purchase price, and the vendee assumes payment of the mortgage, he is estopped to deny its validity.⁷⁴ A grantee who does not agree to assume the mortgage debt cannot be held personally responsible for any deficiency judgment,⁷⁵ even though, in consideration of an extension of time, he agrees to pay the mortgage interest for the term of the extension.⁷⁶ And a vendee who has assumed the payment of a mortgage debt cannot be held for a higher rate of interest than what he has had notice of from the recorded mortgage or otherwise.⁷⁷

Where the deed recites that it is subject to a mortgage, it is as effectually charged with the mortgage debt as if the purchaser expressly assumed the payment of the debt or had executed the mortgage.⁷⁸ If the vendee of mortgaged property assumes the mortgage debt, the mortgagee, though he has a right to enforce the personal liability of the original mortgagor, need not do so and it does not relieve defendant vendee from liability for a deficiency judgment by not taking a deficiency judgment against the original mortgagor.⁷⁹

§ 5845. **Rights of third parties.**—A lessee may, in equity, require the mortgage creditor to proceed first against the unleased land for the satisfaction of the debt.⁸⁰ A water company subsequently receiving a right of way over mortgaged land is entitled to have the other part of the land taken first in satisfaction of foreclosure of the mortgage.⁸¹ A mortgagee who releases his mortgage and takes a quitclaim deed to the premises, takes subject to any incumbrance, such as a bond for a deed, put upon the premises by the mortgagor.⁸² In case of foreclosure of mortgage upon property, including the homestead place, that outside the homestead must be sold first, even though

Newhall v. Hatch, 134 Cal. 269-275, 66 Pac. 266, 55 L. R. A. 673.

⁷⁴ Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319.

⁷⁵ Mueller v. Renkes, 31 Mont. 100, 77 Pac. 512.

⁷⁶ Crebbin v. Shinn, 19 Colo. App. 302, 74 Pac. 795.

⁷⁷ George v. Butler, 26 Wash. 456, 90 Am. St. Rep. 756, 67 Pac. 263, 57 L. R. A. 396.

⁷⁸ Hadley v. Clark, 8 Idaho, 497, 69 Pac. 319; Foster v. Bowles, 138 Cal. 346, 71 Pac. 494.

⁷⁹ Farmers' etc. Bank v. Copsey, 134 Cal. 287, 66 Pac. 324.

⁸⁰ Cal. Civ. Code, § 2899; Mack v. Shafer, 135 Cal. 113, 67 Pac. 40.

⁸¹ Merced Security Sav. Bank v. Simon, 141 Cal. 11, 74 Pac. 356.

⁸² Scott v. Lewis, 40 Or. 37, 66 Pac. 299.

that part is covered by a second mortgage, executed by the husband alone.⁸³

§ 5846. **Demand and notice.**—Against a subsequent purchaser the complaint should allege that the mortgage was recorded, or that defendant had notice when he purchased.⁸⁴ Recording a bond for a deed does not give notice that the obligee in the bond stands in the relation of a mortgagor to the person giving the bond, though that be the intent.⁸⁵ No demand is necessary where a mortgage is payable generally.⁸⁶ When a debt secured by a mortgage is payable in installments, it is not necessary to make a demand for the payment of an installment due before commencing an action of foreclosure, in order to put the mortgagor in default.⁸⁷ The English practice seems to be different.⁸⁸ Nor is the guarantor or surety entitled to notice before commencing suit.⁸⁹

§ 5847. **Description of land.**—Section 58 of the California Practice Act,⁹⁰ relating to the description of land, does not apply to actions for the foreclosure of mortgages.⁹¹ In Indiana, the mortgage, etc., must be made part of the complaint.⁹² But in California it is sufficient that the complaint refer to a copy of the mortgage annexed for a description of the land.⁹³ This is sufficient, if the mortgage sufficiently describes the mortgaged premises.⁹⁴ In an action to foreclose a mortgage as it is written, a mortgagor cannot be heard to complain of an indefinite description of the mortgaged property, whatever might be the effect of a sale under the description.⁹⁵ An irrigation ditch not commenced at the time a trust-deed was executed, and not specifically mentioned therein, is not conveyed by such deed.⁹⁶

83 *McLaughlin v. Hart*, 46 Cal. 638; *Barber v. Babel*, 36 Cal. 11; *Hoppe v. Hoppe*, 104 Cal. 94, 37 Pac. 894.

84 *Peru Bridge Co. v. Hendricks*, 18 Ind. 11.

85 *Holmes v. Newman*, 68 Kan. 418, 75 Pac. 501.

86 *Gillett v. Balcom*, 6 Barb. 370; *Harris v. Mulock*, 9 How. Pr. 402.

87 *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838.

88 *Whitw. Eq. Prac.* 395, note 7.

89 *Rushmore v. Miller*, 4 Edw. Ch.

84; Cal. Civ. Code, § 2807.

90 Cal. Code Civ. Proc., § 455.

91 *Emeric v. Tams*, 6 Cal. 155.

92 *Hiatt v. Goblt*, 18 Ind. 494.

93 *Emeric v. Tams*, 6 Cal. 155;

Whitby v. Rowell, 82 Cal. 635, 23 Pac. 40, 382; *Savings Bank v. Burns*, 104 Cal. 473, 38 Pac. 102.

94 *Johnston v. McDuffee*, 83 Cal. 30, 23 Pac. 214.

95 *Graham v. Stewart*, 68 Cal. 374, 9 Pac. 555.

96 *Crippen v. Comstock*, 17 Colo. App. 89, 66 Pac. 1074.

§ 5848. **Action for foreclosure.**—In California, there shall be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real estate or personal property.⁹⁷ It is an action for the legal determination of the existence of the lien, ascertainment of its extent, and subjection to sale of the estate pledged for its satisfaction.⁹⁸ Thus, where a mortgagee had prosecuted an action in Ohio to final judgment, upon a note secured by mortgage on land in California, he cannot afterwards maintain an action for foreclosure.⁹⁹ The proceeding for a foreclosure of the equity of redemption, as at common law, is unknown to our system.¹⁰⁰ A conveyance absolute in form, intended to secure a loan, cannot be made a strict foreclosure without a foreclosure sale;¹⁰¹ for the remedy of strict foreclosure, being a harsh one, will be decreed only under special circumstances.¹⁰² The owner of the mortgage can in no case become the owner of the premises, except by purchase upon sale under judicial decree, consummated by conveyance,¹⁰³ the surplus after a decree of sale going to the subsequent incumbrancers or the owners of the premises.¹⁰⁴ And adverse titles to the premises are not the proper subjects for determination in the suit.¹⁰⁵ In such cases the decree should reserve the right of the adverse claimants, and so limit the relief awarded as to protect those rights.¹⁰⁶

§ 5849. **Mortgagor bankrupt.**—A mortgagee is not prevented from foreclosing his mortgage in a state court by the fact that the mortgagor has been declared a bankrupt in the United States district court, and the mortgagee has proved his debt therein; but he must obtain leave from the United States district court

⁹⁷ Cal. Code Civ. Proc., § 726. See, also, *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Barbieri v. Ramelli*, 84 Cal. 154, 23 Pac. 1086; *McDermot v. Barton*, 106 Cal. 194, 39 Pac. 538.

⁹⁸ *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Crosby v. Dowd*, 61 Cal. 557, 602. See *National Bank v. Union Ins. Co.*, 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509; *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801; *Brown v. Willis*, 67 Cal. 235, 7 Pac. 682.

⁹⁹ *Ould v. Stoddard*, 54 Cal. 613.

¹⁰⁰ *Goodenow v. Eaver*, 16 Cal. 461, 76 Am. Dec. 540; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

¹⁰¹ *McCaughy v. McDuffie*, 141 Cal. xviii, 74 Pac. 751.

¹⁰² *Flanagan's Estate v. Great Central Land Co.*, 45 Or. 335, 77 Pac. 485.

¹⁰³ *Goodenow v. Eaver*, 16 Cal. 461, 76 Am. Dec. 540.

¹⁰⁴ *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

¹⁰⁵ *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187.

¹⁰⁶ *San Francisco v. Lawton*, 21

to bring his action in the state court.¹⁰⁷ A state district court has jurisdiction to foreclose a mortgage on real estate which lies outside of the judicial district.¹⁰⁸

§ 5850. **Debt falling due by installments.**—If the debt be not all due, so soon as sufficient property is sold to pay the debt due, with costs, the sale shall cease, and the court may order more sold as soon as more of the debt falls due.¹⁰⁹ The proper practice under the code is to apply by motion, and not by petition, for a sale of more of the mortgaged premises as often as more becomes due for principal or interest.¹¹⁰ But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, with a proper rebatement of interest.¹¹¹ When a debt secured is payable in installments, the mortgagee or his assignee has a right to bring an action to foreclose the mortgage when the first installment falls due and is not paid.¹¹² This is also the practice in Ohio.¹¹³ A mortgage given to secure a debt payable by installments may be foreclosed on failure to pay the first installment when due. The bill in such case may set out the amounts not yet due, and if they become due and are not paid before the final hearing, they may be included in the decree.¹¹⁴ To be made subject to foreclosure for failure to pay interest, it must be so specified in the mortgage,¹¹⁵ or at least in the note.¹¹⁶ The mortgagee's election to consider the whole debt due must be evidenced by some outward act, such as bringing suit, or giving notice thereof.¹¹⁷

§ 5851. **Apportioning debt.**—If, subsequent to the mortgage, several persons become entitled to separate portions of the whole

Cal. 589; *Elias v. Verdugo*, 27 Cal. 418. See, also, *Ord v. McKee*, 5 Cal. 515.

¹⁰⁷ *Société d'Epargnes etc. v. McHenry*, 49 Cal. 351.

¹⁰⁸ *Id.*

¹⁰⁹ Cal. Code Civ. Proc., § 728.

¹¹⁰ *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142.

¹¹¹ Cal. Code Civ. Proc., § 728.

¹¹² *Grattan v. Wiggins*, 23 Cal. 16. See *Leonard v. Tyler*, 66 Cal. 299; *Maddox v. Wyman*, 92 Cal. 674, 28 Pac. 838.

¹¹³ *King v. Longworth*, 7 Ohio,

231, pt. 2; *Lansing v. Capron*, 1 Johns. Ch. 617; *Lyman v. Sale*, 2 Johns. Ch. 487.

¹¹⁴ *Magruder v. Eggleston*, 41 Miss. 284.

¹¹⁵ *Bank v. Doherty*, 29 Wash. 233, 92 Am. St. Rep. 903, 69 Pac. 732; *First Nat. Bank v. Citizens' State Bank*, 11 Wyo. 32, 100 Am. St. Rep. 925, 70 Pac. 726.

¹¹⁶ *San Gabriel Valley Bank v. Lake View Town Co.*, 4 Cal. App. 630, 89 Pac. 360.

¹¹⁷ *Trinity County Bank v. Haas*, 151 Cal. 553, 91 Pac. 385.

tract mortgaged, the debt will not be apportioned on their several parts.¹¹⁸ In such case the part of the property still owned by the mortgagor will be first sold; and if that is insufficient to satisfy the decree, the other parts will be subjected, in the inverse order in which they were sold by the mortgagor to the several owners.¹¹⁹

§ 5852. **Conflicting claims.**—The purchaser in good faith and for value of a mortgage should not have his rights prejudiced or postponed by a controversy between purchasers of the mortgaged premises concerning the order in which different portions of the premises covered by the mortgage shall be sold under the foreclosure. He is entitled to judgment for foreclosure and sale, without reference to the conflicting claims of owners of the estate.¹²⁰

§ 5853. **Enforcement of mortgage against a part only of the lands mortgaged** is a waiver of the mortgage lien as to the remainder; but such waiver will not prevent the docketing of a judgment for any unsatisfied balance of the decree.¹²¹

§ 5854. **Jurisdiction—Situs of the mortgaged property.**—An action for the foreclosure of a mortgage must be tried in the county in which the subject of the action, or some part thereof, is situated,¹²² even though the note be made payable in some other county.¹²³ And in order to give the court jurisdiction to enter a decree of foreclosure, it is necessary for the plaintiff to allege and prove that the land sought to be foreclosed is situated in the county in which suit is brought. In the absence of an allegation of such fact in the complaint, the plaintiff is not entitled to prove it; nor can a finding or recital in the decree that the land is situated in such county be supported in the absence of the necessary averment in the complaint.¹²⁴

118 *Perre v. Castro*, 14 Cal. 519, 76 Am. Dec. 444.

119 See *Cheever v. Fair*, 5 Cal. 337;

1 Story's Eq. Jur. 223.

120 *Smart v. Bement*, 3 Keyes, 241.

121 Cal. Code Civ. Proc., § 726; *Mascarel v. Raffour*, 51 Cal. 242; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235, 18 Pac. 808.

122 *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801.

123 *Sherman v. Droubay*, 27 Utah, 47, 74 Pac. 348.

124 *Campbell v. West*, 86 Cal. 197, 24 Pac. 1000. For sufficient allegation of the situation of the mortgaged property, see *Graham v. Stewart*, 68 Cal. 374, 9 Pac. 555.

A complaint in foreclosure describing the lands as situated in a county out of which a new county has been formed since the date of the mortgage, but containing no description identifying the lands as being located in the new county in which the action is brought, is insufficient to sustain a finding that the land is situated therein.¹²⁵

§ 5855. **Equity practice.**—Under the former procedure, if proceedings had been had, the complaint should show that the remedy at law had been exhausted, and with what effect,¹²⁶ but proceedings at law were not necessarily a bar to the foreclosure.¹²⁷ But the practice is different now; if there have been any proceedings, they are to be set up by defense.¹²⁸ The statute of North Dakota,^{128a} requires that a complaint, upon its face, must show whether any proceedings have been had at law or otherwise for the recovery of the debt secured by the mortgage, and such complaint must show that no other proceedings than those referred to therein have been had for such purpose. And it was held that an averment that no other foreclosure proceedings had been instituted than proceedings to foreclose by advertisement, which had been enjoined, was not a compliance with the statute, and that the complaint was therefore vulnerable to demurrer.¹²⁹

§ 5856. **Necessary parties.**—A mortgage given by one void of understanding is void, but where it is given in lieu of another mortgage executed by another, such other person is a necessary party, in order to assert any remedy against him.¹³⁰ Persons acquiring an interest in the premises by purchase at execution sale or otherwise, subsequent to the filing of the suit of foreclosure and notice of *lis pendens*, are not necessary parties.¹³¹ One holding a deed from the mortgagor, which deed is not of record at the time of filing the notice of *lis pendens*, is not a

¹²⁵ Campbell v. West, 86 Cal. 197, 24 Pac. 1000.

¹²⁶ Shufelt v. Shufelt, 9 Paige, 137, 37 Am. Dec. 381; Lovett v. German Reformed Church, 12 Barb. 67.

¹²⁷ Williamson v. Champlin, 8 Paige, 70; Suydam v. Bartle, 9 Paige, 294.

¹²⁸ Newton v. Newton, 12 Ind. 527.

^{128a} Comp. Laws, § 5434.

¹²⁹ Fisher v. Bouisson, 3 N. Dak. 493, 57 N. W. 505. See Dimick v. Grand Island Banking Co., 37 Neb. 394, 55 N. W. 1066.

¹³⁰ Jacks v. Estee, 139 Cal. 507, 73 Pac. 247.

¹³¹ Johnson v. Friant, 140 Cal. 260, 73 Pac. 993; Hibernia Sav. etc. Soc. v. Cochran, 141 Cal. 653, 75 Pac. 315.

necessary party, and is as conclusively bound by the foreclosure decree as if made a party.¹³² In Washington, the heirs of a mortgagor are necessary parties in a foreclosure suit filed after the death of the mortgagor;¹³³ as also is the wife of the mortgagor or of the grantee of the mortgagor.¹³⁴ In Oklahoma and California, the heirs are not necessary parties.¹³⁵

§ 5857. Joinder of parties and actions.—It is not an improper joinder of two causes of action to sue the indorser of a promissory note on his liability as such, and to ask a decree against the mortgagor, foreclosing a mortgage given to secure the same note by another party.¹³⁶ Claims against the mortgagor and mortgagee and persons having liens may be united.¹³⁷ The mortgage and the debt may be united. Where a suit was brought to foreclose a mortgage executed by husband and wife to secure a note made by the husband alone, and the complaint prayed for judgment against the husband for the amount of the note and interest, and a decree against both defendants for the sale of the mortgaged premises, it was held that there was no misjoinder of actions, and the complaint was not demurrable on that ground.¹³⁸

§ 5858. Parties to foreclosure suit.—The cause of action against the mortgagor on the mortgage in such case might be prosecuted to judgment without making the maker of the notes a party.¹³⁹ Or the grantee of the mortgagor may be made defendant without the mortgagor himself.¹⁴⁰ Where certain parties executed notes and a mortgage to secure their payment to certain individuals of their number, suit may be brought for the foreclosure of the mortgage, notwithstanding the plaintiffs in the suit are both payors and payees, mortgagors and mortgagees.¹⁴¹ If there are several notes secured by one mortgage, and part of

132 *Hibernia Sav. etc. Soc. v. Cochran*, 141 Cal. 653, 75 Pac. 315; *Hager v. Astorg*, 145 Cal. 548, 104 Am. St. Rep. 68, 79 Pac. 68.

133 *Anrud v. Scandinavian-American Bank*, 27 Wash. 16, 67 Pac. 364.

134 *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949.

135 *Bayly v. Muehe*, 65 Cal. 345, 3 Pac. 467, 4 Pac. 486; *McClung v. Cullison*, 15 Okla. 402, 82 Pac. 499.

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136 *Eastman v. Turman*, 24 Cal. 382. But see *Sands v. Wood*, 1 Clarke (Iowa), 263.

137 *Farwell v. Jackson*, 28 Cal. 105.

138 *Rollins v. Forbes*, 10 Cal. 299.

139 *Sichel v. Carrillo*, 42 Cal. 493.

140 *California Title Ins. etc. Co. v. Muller*, 3 Cal. App. 54, 84 Pac. 453.

141 *McDowell v. Jacobs*, 10 Cal. 387.

the notes come into the hands of one assignee, he may sue for foreclosure when his notes become due and are unpaid, making the other holders of notes defendants, and such defendants must plead affirmative relief in order that the court may give judgment in favor of such defendants against the mortgagor.¹⁴² The right of the plaintiff to go into equity and foreclose a mortgage given to secure a note depends upon the fact whether he was really interested in the subject-matter. A note was executed to O., as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with L., was entitled to half of the note. It was held that O., having a right to the note, had a right to foreclose the mortgage.¹⁴³ It seems that, on foreclosure of a subsequent mortgage, a prior mortgage cannot be adjudged to be discharged without consent of the prior mortgagee.¹⁴⁴

§ 5859. **Parties to foreclosure suit—Continued.**—All persons interested in the mortgaged premises should be made parties; otherwise, they will be entitled to redeem, even though the sale was made on the oldest lien.¹⁴⁵ So an assignee is entitled to foreclose, but the mortgagee is still a proper party; but if the assignment has been absolute, conveying the entire interest in the mortgage, he is no longer a necessary party.¹⁴⁶ Where the mortgagor has by deed conveyed his equity to another, he need not be a party.¹⁴⁷ A wife, who signed the note, but did not sign the mortgage, is a proper party, since she would be personally liable upon a deficiency judgment.¹⁴⁸ A subsequent purchaser of land mortgaged, or a prior purchaser, subsequently recording his deed,¹⁴⁹ is a proper, if not a necessary, party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee on account of fraud in the purchase, such defect cannot

¹⁴² *West v. Shurtliff*, 28 Utah, 337, 79 Pac. 180.

¹⁴³ *Ord v. McKee*, 5 Cal. 515.

¹⁴⁴ *McReynolds v. Munns*, 2 Keyes, 215.

¹⁴⁵ *Nash's Pl. & Pr.* 346. See *Landon v. Townshend*, 112 N. Y. 93, 8 Am. St. Rep. 712, 19 N. E. 424; *Watts v. Julian*, 122 Ind. 124, 23 N. E. 698.

¹⁴⁶ *Newman v. Chapman*, 2 Rand. 93, 14 Am. Dec. 766; *McGuffey v. Finley*, 20 Ohio, 474. As to foreclosure

by assignee of mortgage, see *Morris v. McKnight*, 1 N. Dak. 266, 47 N. W. 375.

¹⁴⁷ *Bigelow v. Bush*, 6 Paige, 343; *California Title Ins. etc. Co. v. Muller*, 3 Cal. App. 54, 84 Pac. 453.

¹⁴⁸ *Oates v. Shuey*, 25 Wash. 597, 66 Pac. 58.

¹⁴⁹ *Goodwin v. Tyrrell*, 8 Ariz. 238, 71 Pac. 906, 72 Pac. 681; *San Diego Realty Co. v. McGinn*, 7 Cal. App. 264, 94 Pac. 374; *Gillett v. Romig*, 17 Okla. 324, 87 Pac. 325.

be reached by demurrer.¹⁵⁰ Where notes, and a mortgage to secure them, are taken by a trustee in his own name for the benefit of the estate of a decedent, he becomes the trustee of an express trust, and, as such, may sue to foreclose the mortgage, without joining with him the persons for whose benefit the action is prosecuted.¹⁵¹ In an action to foreclose a mortgage on the homestead, executed by the husband, the wife is a necessary party, and if not made a party is entitled to intervene.¹⁵² The foreclosure of a prior mortgage lien upon real property, without making a subsequent judgment-lien creditor a party, in no wise affects the rights of the latter.¹⁵³

§ 5860. Parties supplemental.—If the real holders of the title are not parties to the decree of foreclosure, a court of equity will allow them to be made such by a supplemental complaint, provided application be made within a reasonable time.¹⁵⁴ It is only such as have an interest in and under the mortgagor that are necessary parties. The suit is to extinguish his title.¹⁵⁵ The action may be maintained by one who is surety for the mortgage debt to compel payment or foreclosure.¹⁵⁶

§ 5861. Substituted parties.—Where the plaintiff, being the owner of an undivided half of a tract of land, mortgaged his interest therein to A., and subsequently, with his cotenant, conveyed the land to B. and C., two thirds to one and one third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due, the plaintiff filed his bill against B. and C. to compel a foreclosure and payment, it was held that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action.¹⁵⁷ A mere stranger who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot after-

¹⁵⁰ DeLeon v. Higuera, 15 Cal. 495.

¹⁵¹ White v. Allatt, 87 Cal. 245, 25 Pac. 420.

¹⁵² Mabury v. Ruiz, 58 Cal. 11.

¹⁵³ De Lashmutt v. Sellwood, 10 Or. 319. As to joinder of maker and indorser of mortgage note in foreclosure proceedings, see Smith v. McEvoy, 8 Utah, 58, 29 Pac. 1030.

¹⁵⁴ Heyman v. Lowell, 23 Cal. 106.

¹⁵⁵ Eagle F. Co. v. Lent, 6 Paige, 635.

¹⁵⁶ Marsh v. Pike, 10 Paige, 595; Lawrence v. Lawrence, 3 Barb. Ch. 71; Cornell v. Prescott, 2 Barb. 16; Vanderkemp v. Snelton, 11 Paige, 28.

¹⁵⁷ Abell v. Coons, 7 Cal. 105, 68 Am. Dec. 229.

wards come into equity and, in the absence of fraud, accident, or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee.¹⁵⁸

§ 5862. **Estate of deceased partner.**—An action to foreclose a mortgage made by a deceased partner on his separate estate may be maintained without showing in the complaint that the firm is insolvent, or that the mortgagee has pursued his remedy upon the debt against his surviving partner. In such case, if the surviving partner be the executor, and also claims an interest in the mortgaged property as devisee, he may be, as an individual, made co-defendant with himself as executor.¹⁵⁹

5863. **Executors as parties defendant.**—An action may be maintained against an executor or administrator to foreclose a mortgage upon real estate executed by his testator or intestate, although the debt secured by the mortgage has been presented and allowed,¹⁶⁰ without joining the heirs of the mortgagor as defendants.¹⁶¹ The action for a foreclosure of a mortgage upon real property is not brought for the possession merely of the property, except as such possession may follow the sheriff's deed, but to subject to sale the title which the mortgagor had at the time of executing the mortgage, and to cut off the rights of parties subsequently becoming interested in the premises; and executors and administrators do not possess the title, but only a temporary right to the possession.¹⁶²

§ 5864. **Infant defendants.**—If there are infant defendants, the complaint must state what their interest is, and whether it is paramount or subordinate to the interest mortgaged.¹⁶³

§ 5865. **Surplus averment.**—If the complaint in a foreclosure suit avers that the mortgage was executed by the defendant (thereby making it by averment a legal mortgage), and also

¹⁵⁸ *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518.

¹⁵⁹ *Savings & Loan Soc. v. Gibb*, 21 Cal. 595.

¹⁶⁰ *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; *First Nat. Bank v. Glenn*, 10 Idaho, 224, 109 Am. St. Rep. 204, 77 Pac. 623.

¹⁶¹ *Bayly v. Muehe*, 65 Cal. 345; *McClung v. Cullison*, 15 Okla. 402, 82 Pac. 499.

¹⁶² *Burton v. Lies*, 21 Cal. 87.

¹⁶³ *Aldrich v. Lapham*, 6 How. Pr. 129.

sets out a copy of the same, and it appears on its face not to be a legal, as distinguished from an equitable, mortgage, the averment may be rejected as surplusage.¹⁶⁴

§ 5866. **Claims against estate.**—The words “claimant” and “claim” are synonymous with the words “creditor” and “legal demand.”¹⁶⁵ The word “claims” does not embrace mortgage liens, but has reference only to such debts or demands against decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which only a money judgment could have been rendered.¹⁶⁶ The word “claim,” when it speaks of claims against an estate, is broad enough to include a mortgage, or a note secured by a mortgage.¹⁶⁷

The creditor of the estate of a deceased person whose claim is secured by mortgage may, after presentation of his claim, proceed at once to foreclose the mortgage, whether it be allowed or rejected.¹⁶⁸ But the claim must first be presented to the executor or administrator and the probate judge.¹⁶⁹ Unless such presentation is made, the mortgagee cannot recover costs and attorney fees.¹⁷⁰

§ 5867. **Receiver.**—The plaintiff has no right to have a receiver of rents and profits appointed during litigation.¹⁷¹ The Code of Civil Procedure of California provides that, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt, a receiver may be appointed in an action to foreclose.¹⁷² And though the mortgage provides that a receiver may be appointed upon the filing of the complaint

¹⁶⁴ *Love v. Sierra Nevada L. W. & M. Co.*, 32 Cal. 639, 91 Am. Dec. 602. As to variance between pleadings and the mortgage, see *Sears v. Barnum*, *Clarke Ch.* 139.

¹⁶⁵ *Gray v. Palmer*, 9 Cal. 616.

¹⁶⁶ *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140.

¹⁶⁷ *Ellis v. Polhemus*, 27 Cal. 350.

¹⁶⁸ *Willis v. Farley*, 24 Cal. 490.

¹⁶⁹ *Id.*; *Hearn v. Kennedy*, 85 Cal.

¹⁷⁰ Cal. Code Civ. Proc., § 1500.

¹⁷¹ *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490.

¹⁷² Cal. Code Civ. Proc., § 564, subd. 2. See *Illinois Trust & Sav. Bank v. Alvord*, 99 Cal. 407, 410, 33 Pac. 1132; *Toby v. Oregon Pacific R. Co.*, 98 Cal. 490, 495, 33 Pac. 550; *Moneriff v. Hare*, 38 Colo. 221, 87 Pac. 1082; *Harding v. Garber*, 20 Okla. 11, 93 Pac. 539.

in foreclosure, nevertheless, in the absence of an allegation that the property is probably insufficient to pay the debt, interest, and costs, the court has no jurisdiction to appoint a receiver.¹⁷³ And this is so even though the mortgage itself authorizes the appointment.¹⁷⁴ In Colorado, there must be an allegation that the mortgagor will commit waste, or that the property will depreciate in value.¹⁷⁵

The receiver is an officer of the court, and has no right to make application for a confirmatory order; but the fact that he does so does not affect the jurisdiction of the court to make such order.¹⁷⁶

§ 5868. **Injunction.**—The court may, on good cause shown, restrain the party in possession of the mortgaged premises from committing injury to the same during foreclosure.¹⁷⁷ The remedy in such case is only preventive, and not exclusive of any other remedy.¹⁷⁸

§ 5869. **Interest, averment of.**—In an action to foreclose a mortgage, an allegation that a party who is made a co-defendant with the mortgagor has or claims to have some interest in or claim upon the mortgaged premises is sufficient, without averring the character of the interest.¹⁷⁹ A general allegation in the complaint that such parties have or claim to have some interest in the property is all that is required.¹⁸⁰

§ 5870. **Lien of bondholder.**—The lien of a bondholder who has lent money to a state, on the pledge of certain property by its legislature, cannot be divested or postponed by a subsequent act of such legislature. Such bondholder is protected by the clause of the constitution of the United States which

¹⁷³ Bank of Woodland v. Stephens, 144 Cal. 659, 79 Pac. 379.

¹⁷⁴ Garretson Inv. Co. v. Arndt, 144 Cal. 64, 77 Pac. 770.

¹⁷⁵ Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067.

¹⁷⁶ Anderson v. Riddle, 10 Wyo. 277, 68 Pac. 829.

¹⁷⁷ Cal. Code Civ. Proc., § 745.

¹⁷⁸ Sands v. Pfeiffer, 10 Cal. 253. See More v. Calkins, 85 Cal. 177, 24 Pac. 729.

¹⁷⁹ Anthony v. Nye, 30 Cal. 401; Sichler v. Look, 93 Cal. 600, 29 Pac. 220; San Francisco Breweries v. Schurtz, 104 Cal. 420, 38 Pac. 92; Dexter etc. Co. v. Long, 2 Wash. 435, 26 Am. St. Rep. 867, 27 Pac. 271; Carpenter v. Ingalls, 3 S. Dak. 49, 44 Am. St. Rep. 753, 51 N. W. 948.

¹⁸⁰ Poett v. Stearns, 28 Cal. 226. See Bradbury v. Davenport, 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062.

forbids a state to pass a law impairing the obligation of contracts. The bondholder does not lose the lien of his first bonds by surrendering or exchanging others of later date and of inferior security for canal stock and other state pledges.¹⁸¹ A suit could be maintained upon the coupons, without production of the bonds to which they had been attached.¹⁸² A coupon payable to bearer, cut from a bond and owned by one party, while another party owns the bond, is still a lien under a mortgage given to secure the bond, and entitles the holder to share *pro rata* in the proceeds of said mortgage on foreclosure.¹⁸³

§ 5871. **Power of sale in mortgage.**—When a mortgage contains a power of sale, the mortgagee has his election to foreclose in chancery or to sell under the power.¹⁸⁴ Such power gives a cumulative remedy, and does not affect the right to foreclose.¹⁸⁵ Or the mortgagee, with the consent of the mortgagor, may be authorized to sell the premises to pay the debt.¹⁸⁶ The legal title passes by the sale of the mortgaged premises; but where the mortgagee becomes the purchaser indirectly, by having the premises bid off for him, the sale is voidable on application in equity by the mortgagor.¹⁸⁷ A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction and execute to the purchaser a deed of the same, upon default of paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial sale.¹⁸⁸

§ 5872. **Sale under statute foreclosure.**—Where the agent employed by the mortgagee to sell property sold it at a time contrary to instructions given him, and for something less than its value, it was held that the purchaser having bought in good faith, without knowledge of the instructions, the courts should

¹⁸¹ Trustees of Wabash etc. Canal Co. v. Beers, 2 Black, 448, 17 L. Ed. 327.

¹⁸² Commissioners of Knox Co. v. Aspinwall, 21 How. 539, 16 L. Ed. 208.

¹⁸³ Miller v. Rutland etc. R. R. Co., 40 Vt. 399, 94 Am. Dec. 414; Arents v. Commonwealth, 18 Gratt. (Va.) 750.

¹⁸⁴ Cormerais v. Genella, 22 Cal. 116.

¹⁸⁵ Id.

¹⁸⁶ Fogarty v. Sawyer, 17 Cal. 589.

¹⁸⁷ Blockley v. Fowler, 21 Cal. 326, 82 Am. Dec. 747.

¹⁸⁸ Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651. See, also, Civ. Code,

not set aside the sale. An attorney acting in such transaction might be treated as acting in his professional character, except where third persons are thus affected. A notice of sale on a statutory foreclosure need not specify that the mortgage will be foreclosed.¹⁸⁹ The court has jurisdiction in an action to foreclose a mortgage to order a sale of the mortgaged property by a commissioner, although the prayer of the complaint follows the usual form and asks for a sale of the mortgaged property by the sheriff, the essence of the prayer being only for a judicial sale.¹⁹⁰

§ 5873. **Deficiency.**—The party on a bill to foreclose a mortgage is confined in his remedy to the pledge. Such a suit is not intended to act *in personam*. It seems to be pretty generally admitted that the mortgagee may proceed at law on his bond or covenant at the same time that he is prosecuting his mortgage in chancery; and that after foreclosure he may sue at law for the deficiency.¹⁹¹ In California, however, judgment may be rendered for the amount found due upon the personal obligation to secure which the mortgage is executed.¹⁹² Parties are at liberty to adopt the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and after sale apply for the ascertainment of any deficiency and for execution for the same, or they may take a formal judgment for the amount due in the first instance.¹⁹³ But the lien does not attach until after a sale and deficiency reported, even though the judgment is docketed when first rendered.¹⁹⁴

§ 5874. **Right of surety by mortgage.**—Where property was mortgaged by a surety to secure the payment of notes of his principal, and the mortgage expressly provided that the surety

§ 358; *More v. Calkins*, 95 Cal. 435, 29 Am. St. Rep. 128, 30 Pac. 583.

¹⁸⁹ *Leet v. McMaster*, 51 Barb. 236.

¹⁹⁰ *McDermot v. Barton*, 106 Cal. 194, 39 Pac. 538.

¹⁹¹ *Schoole v. Sall*, 1 Sch. & Lef. 176; *Aylett v. Hill*, *Dickens*, 551; *Took's Case*, *Dickens*, 785; *Perry v. Barker*, 13 Ves. Jr. 198; *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317.

¹⁹² *Rollins v. Forbes*, 10 Cal. 299; *Rowland v. Leiby*, 14 Cal. 156; *Englund v. Lewis*, 25 Cal. 337.

¹⁹³ *Rowland v. Leiby*, 14 Cal. 156; *Rowe v. Table Mountain Water Co.*, 10 Cal. 441; *Hobbs v. Duff*, 23 Cal. 624.

¹⁹⁴ *Hibberd v. Smith*, 50 Cal. 511; Cal. Code Civ. Proc., § 726.

should not be personally liable, and the surety took another mortgage from his principal to indemnify himself, it was held that the holders of the notes might subject the premises mortgaged by the surety to the payment of the notes, or they might abandon the mortgage and subject the property of the principal in the hands of the surety to the payment of the notes, or they might have the property mortgaged to secure the notes sold, the proceeds applied to their satisfaction, and, if any balance remained unpaid, to subject the surplus of any property of the principal in the hands of the surety that might remain after compensating the surety for loss or damage by the appropriation of his property mortgaged; but they are not entitled to appropriate both the property mortgaged by the surety and that conveyed or mortgaged by the principal to the surety for the indemnity of the latter.¹⁹⁵

§ 5875. **When action lies, by surety.**—Where a judgment is rendered against A. and his sureties, and A. and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B., a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released, it is held that no action can be maintained on the mortgage; for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied.¹⁹⁶

§ 5876. **Separate debts secured by one mortgage.**—Where separate debts of several persons are secured by one mortgage, either creditor may bring suit to foreclose, but other parties interested must be brought in.¹⁹⁷

§ 5877. **Severance from realty.**—The severance and removal of a house by flood-waters from land covered by a mortgage withdraw the house from the mortgage lien; and after the removal the mortgagor or his assignee has a right to sell the house, and the purchaser may convert it to his own use.¹⁹⁸ If fixtures are removed by authority of the mortgagee before foreclosure, and

¹⁹⁵ Van Orden v. Durham, 35 Cal. 136.

¹⁹⁶ People v. Chisholm, 8 Cal. 29.

¹⁹⁷ Tyler v. Yreka Water Co., 14 Cal. 212.

¹⁹⁸ Buckout v. Swift, 27 Cal. 434, 87 Am. Dec. 90.

the mortgagee become the purchaser, the mortgagor may recover the value of the fixtures so removed.¹⁹⁹

§ 5878. **Statute of limitations.**—In California, an action upon any contract, obligation, or liability founded upon an instrument in writing executed in that state, is barred in four years; if executed out of the state, in two years.²⁰⁰ If the right to foreclose is given upon default in the payment of interest, it is merely permissive, and limitations do not commence to run upon such default.²⁰¹ A mortgagee purchasing under a void foreclosure sale, and going into possession, is then a mortgagee in possession, and limitations do not run against a mortgagee in possession.²⁰² Where an action upon a promissory note, secured by a mortgage of the same date upon real property, is barred by the statute of limitations, the mortgagee has no remedy upon the mortgage; and although he may pursue distinct remedies upon the note and mortgage, the limitation prescribed is the same in both cases.²⁰³ However, a mortgage may appear of record to be barred by the statute of limitations, and yet not be, on account of an extension of time by renewing the note or debt secured.²⁰⁴

The mortgage is as much within the general designation of a contract, obligation, or liability founded upon an instrument in writing, as is the note itself.²⁰⁵ The statute may be pleaded by one who holds a mortgage upon the same land, executed after the note secured by the first mortgage became barred,²⁰⁶ or by the grantee of the mortgagor.²⁰⁷ In other states, a different rule prevails by force of different statutes of limitations, though resting upon the same principle,—viz. that the note and mortgage are affected by the statute independently of each other, and hence where a longer period is prescribed for a mortgage than for the note secured, the remedy upon the mortgage will continue, notwithstanding the note may be barred; and where

¹⁹⁹ Hill v. Gwin, 51 Cal. 47.

²⁰⁰ Code Civ. Proc., §§ 337, 339. See Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Ludwig v. Murphy, 143 Cal. 473, 77 Pac. 150.

²⁰¹ First Nat. Bank v. Parker, 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756.

²⁰² Investment Securities Co. v. Adams, 37 Wash. 211, 79 Pac. 625.

²⁰³ Lord v. Morris, 18 Cal. 482.

²⁰⁴ Lent v. Morrill, 25 Cal. 492; Newhall v. Hatch, 134 Cal. 269-275, 66 Pac. 266, 55 L. R. A. 673; White v. Stevenson, 144 Cal. 104, 77 Pac. 828; White v. Krutz, 37 Wash. 34, 79 Pac. 495.

²⁰⁵ Lord v. Morris, 18 Cal. 482. See, also, Low v. Allen, 26 Cal. 142; Sichel v. Carrillo, 42 Cal. 493.

²⁰⁶ Id.

²⁰⁷ McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754.

the limitation is the same, the bar, though separate, will occur at the same time.²⁰⁸ Thus, in Georgia, a promissory note is barred in six years, and a mortgage in twenty; but the note being barred will not prevent an action to foreclose the mortgage.²⁰⁹

§ 5879. **Statute of limitations—Renewal.**—In a California case,^{209a} it was held that a renewal of a note secured by a mortgage upon lands, so as to extend the time within which it would be barred by the statute of limitations, carries with it an extension of the lien of the mortgage to the time when the note will expire by the terms of the renewal, if at the time the note is renewed the maker of the note, being also the mortgagor, is still the owner of the lands mortgaged. The correctness of this ruling might be open to question upon principle, upon the theory adopted in the cases cited in the preceding section, namely, that the statute operates upon these obligations separately; that they give distinct remedies to the creditors, which may be separately enforced; that the one is a personal obligation, while the other creates no personal obligation, but a lien on specific property; that a debtor may be willing to renew his personal obligation, and not willing to renew a lien on his property; and that a willingness to do the latter cannot be inferred from the former, any more than the making of the note originally, *per se*, created a mortgage. It is true that the mortgage is an incident to the debt, but it is not a necessary incident, and, though frequent, it is not even a usual one. It is created by a separate act, with certain formalities which are not required in making a promissory note. The code, however, seems to have settled the question. It provides: "A mortgage can be created, renewed, or extended, only by writing, executed with the formalities required in the case of a grant of real property."²¹⁰

§ 5880. **Statute of limitations—Estates.**—The statute requiring claims against an estate to be presented to the executor or administrator for allowance within a specified time, is practically a statute of limitations. A mortgage upon the lands of decedent is a claim within the meaning of this statute, and must

²⁰⁸ See *Sichel v. Carrillo*, 42 Cal. 493, and cases there cited.

²⁰⁹ *Elkins v. Edwards*, 8 Ga. 326. See, also, *Thayer v. Mann*, 19 Pick. 535; *Joy v. Adams*, 26 Me. 333.

^{209a} *Lent v. Morrill*, 25 Cal. 492.

²¹⁰ Cal. Civ. Code, § 2922; *Newhall v. Hatch*, 134 Cal. 269-275, 66 Pac. 266, 55 L. R. A. 673; *White v. Krutz*, 37 Wash. 34, 79 Pac. 495.

be presented for allowance.²¹¹ This is certainly true when there is no note or other obligation aside from the mortgage. It seems that the presentation of a note secured by mortgage is sufficient to sustain the mortgage.²¹² Where a note, executed by one person is secured by a mortgage executed by another, it is not necessary to present the note for allowance to the executor or administrator of the maker of the note, but the mortgage may be enforced notwithstanding the claim against the estate is barred.²¹³ So it is not necessary to present the note, though the mortgage was given by the decedent, if he afterwards conveyed the lands to another.²¹⁴

§ 5881. **Complaint, or petition.**—A complaint in foreclosure need not allege non-payment by defendant of the attorney fees not yet earned or fixed by the court, nor what sum would be a reasonable fee; but it is sufficient to allege that the mortgage provides for an attorney fee, and the payment of certain taxes under the mortgage agreement.²¹⁵ In a suit to foreclose a mortgage released of record, the discharge is a matter of defense, and need not be excused or shown by the allegations of the complaint to be inoperative. Such excuse may be set out in reply.²¹⁶ As to the prayer for interest, it is proper to ask for interest from the date of the note, at the rate therein specified; but from the date of the judgment no rate greater than seven per cent can be allowed.²¹⁷

§ 5882. **Essential averments.**—In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient.²¹⁸ And an action will not lie on the mere recital in a mortgage of the existence of a debt.²¹⁹ It must state that the debt was due when the action was commenced.²²⁰ Where

211 *Ellis v. Polhemus*, 27 Cal. 350; *Pitte v. Shipley*, 46 Cal. 160.

212 *Fallon v. Butler*, 21 Cal. 32, 81 Am. Dec. 140.

213 *Sichel v. Carrillo*, 42 Cal. 493. See *Hibernia etc. Loan Soc. v. Conlin*, 67 Cal. 178, 7 Pac. 477; *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

214 *Christy v. Dana*, 42 Cal. 174.

215 *Damon v. Quinn*, 143 Cal. 75, 76 Pac. 818.

216 *White v. Stevenson*, 144 Cal. 104, 77 Pac. 828.

217 *Thrasher v. Moran*, 146 Cal. 683, 81 Pac. 32.

218 *Shafer v. Bear River etc. Water etc. Co.*, 4 Cal. 294.

219 *Id.*; *Chesney v. Chesney*, 33 Utah, 503, 94 Pac. 989.

220 *Hare v. Van Deusen*, 32 Barb. 92; *Smith v. Holmes*, 19 N. Y. 271; *McCullough v. Colby*, 4 Bosw. 603; *Watson v. Thibou*, 17 Abb. Pr. 184.

the complaint shows with reasonable certainty that at the time the mortgage was given the debt recited was already due and unpaid, an objection to the complaint that it does not allege non-payment of the sum demanded is not tenable.²²¹ Nor is it necessary to allege in the complaint a notice to the mortgagor that the plaintiff has elected to consider the whole sum due for default in payment of installments of interest.²²² It has been held that the indebtedness for which the mortgage was given need not be set forth.²²³ The averment in the complaint that the plaintiff is the owner of the note and mortgage is sufficient, without stating that he is holder.²²⁴ A complaint in an action commenced after the death of a husband, on a note and mortgage executed by the husband and wife during the life of the husband, does not state a cause of action unless it aver that the husband in his lifetime failed to pay the note.²²⁵ A complaint in a suit to enforce a mortgage on a widow's dower interest must show the facts from which the portion of the mortgage debt properly chargeable to such dower interest can be ascertained.²²⁶ Under the Washington procedure, in an action to foreclose a mortgage on real estate, a complaint is sufficient which states the title of the cause, name of the court, name of the county in which the action is brought, names of the parties to the action, and gives a plain and concise statement of the execution of a promissory note for the amount claimed, the execution of a mortgage to secure the same, the time of maturity of the note, its non-payment, and that the plaintiffs are the owners and holders of the note.²²⁷ In order to divest defaulting defendants of rents and profits, the complaint must contain an allegation and prayer to that effect.²²⁸

§ 5883. Allegation of plaintiff's suretyship.—In an action by a surety on a promissory note to foreclose a mortgage given to secure him from liability thereon, a judgment in favor of the

221 *Chaffee v. Browne*, 109 Cal. 211, 41 Pac. 1028.

222 *Broadbent v. Brumback*, 2 Idaho, 366, 16 Pac. 555. See, also, *Whitcher v. Webb*, 44 Cal. 130; *Dean v. Applegarth*, 65 Cal. 391, 4 Pac. 375; *Pacific Mutual Life Ins. Co. v. Shepardson*, 77 Cal. 345, 19 Pac. 583; *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142.

223 *Day v. Perkins*, 2 Sandf. Ch. 359.

224 *Rollins v. Forbes*, 10 Cal. 299.

225 *Brown v. Orr*, 29 Cal. 120.

226 *Fowle v. House*, 29 Or. 114, 44 Pac. 692.

227 *Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734.

228 Cal. Code, Civ. Proc., § 580; *Garretson Inv. Co. v. Arndt*, 144 Cal. 64, 77 Pac. 770.

plaintiff will not be reversed for want of a sufficient allegation in the complaint of the plaintiff's suretyship, when the language of the mortgage, as set out in the complaint, is sufficient to show, in the absence of any proof to the contrary, that the plaintiff was a surety, and no demurrer was interposed pointing out any special defects in the complaint.²²⁹ Where the complaint alleges the giving of a bond conditioned for the payment of a sum of money, and that the mortgage was given as collateral security therefor, and contained the same condition, it must also allege a default in the performance of the condition of the bond.²³⁰

§ 5884. Allegation of assumption of debt by grantee.—An allegation in the complaint in a mortgage foreclosure, that the grantee of the mortgaged premises at the time of his purchase covenanted and agreed to pay the mortgage debt and discharge the mortgage, is sufficient to sustain a personal judgment against such grantee for the deficiency.²³¹ An allegation that the grantees of the mortgagor, who were made defendants, "assumed and agreed" to pay the mortgage debt is not the statement of two distinct propositions, but the word "assumed," as used in the allegation, is synonymous with the word "agreed"; and a denial in the answer by such grantees that they "assumed and agreed" to pay the mortgage debt is not a conjunctive or evasive denial, but is sufficient to raise an issue as to such allegation; and a finding of fact based upon a supposed admission of the pleadings as to their assumption and agreement to pay the debt is erroneous.²³²

§ 5885. Averment of record and acknowledgment.—As against the mortgagor, the allegation of record and acknowledgment is immaterial and unnecessary; or that the mortgagor has not conveyed,²³³ except in case of a married woman.²³⁴

§ 5886. Decree in case of default.—In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill.²³⁵

²²⁹ *Waldrip v. Black*, 74 Cal. 409, 16 Pac. 226.

²³⁰ *Coulter v. Bowen*, 11 Daly, 203.

²³¹ *Pellier v. Gillespie*, 67 Cal. 582, 8 Pac. 185.

²³² *Jones v. Eddy*, 90 Cal. 147, 27 Pac. 190.

²³³ *St. Mark's Fire Ins. Co. v. Harris*, 13 How. Pr. 95.

²³⁴ *Perdue v. Aldridge*, 19 Ind. 290; *Culph v. Phillips*, 17 Ind. 209.

²³⁵ *Raun v. Reynolds*, 11 Cal. 14; see, also, *Code Civ. Proc.*, § 580.

§ 5887. **Allegation that "defendants claim some interest."**—This allegation is sufficient against defendants who claim subsequent to the plaintiff's mortgage. It is only important in a contest as to the surplus.²³⁶ But a decree against such defendants does not bar rights which are paramount to the title of both mortgagor and mortgagee.²³⁷

§ 5888. **Two mortgages on the same property.**—Where plaintiff holds two mortgages on the same property, and the property is indivisible, he may foreclose when the first becomes due.²³⁸

§ 5889. **Waiver of right to foreclose.**—A. commenced an action against B. on a money demand, and to foreclose a mortgage given to secure his debt. On motion of A.'s attorney, the prayer for foreclosure of the mortgage and sale of the property was stricken out, and a money judgment taken. It was held that this was an abandonment and waiver of A.'s right to a foreclosure and sale of the mortgaged property.²³⁹

§ 5890. **Accounting and redemption.**—In a bill for an accounting and redemption, a distinct offer to pay the amount due is not necessary. The form is, that, on the payment of what, if anything, shall be found due, the mortgagee may be decreed to deliver possession, etc.²⁴⁰

§ 5891. **Merger of mortgage lien with the fee title,** upon both being united in the same person, is a question of intent, and merger will not be implied if there is an intervening claim; and if a merger would be disadvantageous to the fee-holder, the presumption is against merger, and equity will keep the lien alive for the purpose of doing justice.²⁴¹

§ 5892. **Merger of mortgages.**—The acceptance of a conveyance of mortgaged property in payment of the mortgage debt, and without knowledge of a judgment lien thereon, is not a

²³⁶ Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Drury v. Clark, 16 How. Pr. 424.

²³⁷ Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706, 11 Barb. 152.

²³⁸ Hawkins v. Hill, 15 Cal. 499, 76 Am. Dec. 499.

²³⁹ Ladd v. Ruggles, 23 Cal. 232.

²⁴⁰ Quin v. Brittain, 1 Hoffm. Ch. (N. Y.) 353. See Barton v. May, 3 Sandf. Ch. 450; Posten v. Miller, 60 Wis. 494, 19 N. W. 540.

²⁴¹ Anglo-Californian Bank v. Field, 146 Cal. 644, 80 Pac. 1080.

merger of the mortgage in the fee so as to make the judgment a first lien upon the property.²⁴² If there have been intervening liens and interests when the mortgagor conveys to the mortgagee, there is no merger of the legal and equitable title in the mortgagee, and the mortgage remains security for the notes.²⁴³ The agreement of the mortgagor to give up the mortgaged premises, in consideration of the surrender of the mortgage note, is without new consideration and unenforceable.²⁴⁴

§ 5893. **Several notes.**—Where several notes have been given which are secured by one mortgage, and the notes are assigned to different persons, the assignor has a right, by agreement with the assignees, to fix the rights of the purchasers of the several notes to the mortgage security. Where, in such a case, the assignee of a note, having the first right to the benefit of the mortgaged security, forecloses when the debt falls due, and obtains a decree under which all the mortgaged property is sold, such foreclosure and sale operate as an extinguishment of the mortgage. The holders of the other notes secured by the mortgage have a right to redeem from the sale made under such foreclosure; but when not made parties to the action, they must assert this right to redeem within four years, or it is barred by the statute of limitations.²⁴⁵ An assignment of a distinct part of a debt secured by mortgage carries with it a *pro tanto* interest in the mortgage, and a lien in common to the extent of such interest.²⁴⁶ A subsequent insertion of the assignee's name, with consent of the assignor, makes the assignment valid.²⁴⁷

§ 5894. **Action by assignees.**—Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail-bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least there is no error in such a decree to the prejudice of the

²⁴² Woodhurst v. Cramer, 29 Wash. 40, 69 Pac. 501.

²⁴³ Chase Nat. Bank v. Security Sav. Bank, 28 Wash. 150, 68 Pac. 454.

²⁴⁴ Borchardt v. Favor, 16 Colo. App. 406, 66 Pac. 251.

²⁴⁵ Grattan v. Wiggins, 23 Cal. 16.

²⁴⁶ Miller v. Campbell, 13 Okla. 75, 74 Pac. 507.

²⁴⁷ Fidelity Ins. etc. Co. v. Nelson, 30 Wash. 340, 70 Pac. 961.

defendants.²⁴⁸ If a mortgage is assigned by the mortgagee to another party as a pledge for the payment of a debt due to the other party by the mortgagee, it is not an improper joinder of several causes of action for the assignee to unite in the same action his claim against the mortgagor and mortgagee and persons having liens or incumbrances upon the mortgaged property, and make them all parties.²⁴⁹

§ 5895. **Notice of assignment.**—The record of the assignment of a mortgage is not of itself notice to the mortgagor so as to invalidate any payments made to the original mortgagee prior to actual notice.²⁵⁰ A claim under the assignment of a released mortgage, being non-negotiable, is not validated by lack of notice of such release, as the assignment is taken subject to all existing equities.²⁵¹

§ 5896. **Averment of assignment.**—In a foreclosure action, the complaint alleged that the mortgage was executed and delivered to one P.; that he was since deceased, and that his wife, having been qualified as his executrix, had duly assigned the same to the plaintiff; that it was owned and held by him by virtue of the assignment. The answer denied that the mortgage was owned by the plaintiff by virtue of the assignment, or that he was the lawful owner of it. On the trial, the plaintiff produced a mortgage in which the mortgagee was named as "P., acting administrator of the estate of D." It was held that evidence on behalf of defendants to show that the mortgage was taken to secure a debt due to the estate of "D.," and therefore that the executrix had no title to it, was admissible.²⁵² An allegation that a mortgage has been assigned to the plaintiff, coupled with an averment that the plaintiff is the holder and owner of the notes secured by the mortgage, sufficiently shows title to the notes as well as to the mortgage in the plaintiff, although the notes and mortgage appear to be payable to another person.²⁵³

²⁴⁸ *Hunter v. Levan*, 11 Cal. 11.

²⁴⁹ *Farwell v. Jackson*, 28 Cal. 105.

²⁵⁰ *Rodgers v. Parker*, 136 Cal. 313, 68 Pac. 975; Cal. Civ. Code, § 2935.

²⁵¹ *Adams v. Hopkins* (Cal.), 69 Pac. 228.

²⁵² *Renaud v. Conselyea*, 7 Abb. Pr. 105; reversing 5 Abb. Pr. 346. See, further, as to averment of assignment, *Preston v. Loughran*, 58 Hun, 210, 12 N. Y. Supp. 313; *Rose v. Meyer*, 1 How. Pr. (N. S.) 274.

²⁵³ *Fisher v. Bouissou*, 3 N. Dak. 493, 57 N. W. 505.

§ 5897. **Action to redeem—Tender.**—A subsequent party in interest, whether by way of mortgage, lease, or judgment, cannot on motion obtain a right to redeem and have the property conveyed to him by a purchaser. The only remedy in such a case is by an action seeking to enforce such right to redeem; and in such an action the rights of all other parties can be protected.²⁵⁴ Although a power-of-sale mortgage authorizes the mortgagee or his assignee to become the purchaser at the sale, yet if he fails in the utmost diligence in protecting the rights of the mortgagor, the mortgagor will be allowed to redeem.²⁵⁵ The plaintiff in an action to redeem a mortgage need not allege or prove a tender of the amount due upon the mortgage debt previous to the commencement of the action.²⁵⁶ Redemption will be decreed on no other terms than the payment of the mortgagee's claim in full.²⁵⁷ But the mortgagee cannot, as a general rule, require as a condition precedent of redemption from a mortgage by deed absolute the payment of any other debt not secured by the deed and not a lien upon the land.²⁵⁸ A junior incumbrancer, in redeeming from a senior mortgage, must pay the full amount of the mortgage debt, although he seeks to redeem but a part of the mortgaged premises.²⁵⁹

§ 5898. **Subsequent incumbrances and liens.**—If there are incumbrancers which the plaintiff insists are subsequent to his mortgage, but who claim to have a prior equity,—e. g. where the plaintiff claims to have become a mortgagee in good faith, without notice of a prior claim,—the facts must be specially stated.²⁶⁰ It seems that it is not necessary to make a claim for payment of subsequent liens.²⁶¹ Where the sheriff was proceeding to sell under a judgment in a case of foreclosure, and the plaintiff, as subsequent mortgagee, tendered to him the

²⁵⁴ *Douglass v. Woodworth*, 51 Barb. 79. That one cannot, against his consent, be deprived of the right of redemption without due process of law, see *Sellwood v. Gray*, 11 Or. 534, 5 Pac. 196.

²⁵⁵ *Montague v. Dawes*, 14 Allen, 369. See *Hahn v. Pindell*, 3 Bush, 189, 193.

²⁵⁶ *Daubenspeck v. Platt*, 22 Cal. 330.

²⁵⁷ *Cuddeback v. Detroy*, 61 Cal. 80.

²⁵⁸ *Mahoney v. Bostwick*, 96 Cal. 53, 31 Am. St. Rep. 175, 30 Pac. 1020.

²⁵⁹ *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293.

²⁶⁰ *Potter v. Crandall*, Clarke Ch. 119; *Bank of Orleans v. Flagg*, 3 Barb. Ch. 316.

²⁶¹ *Field v. Hawkhurst*, 9 How. Pr. 75. See, as to former practice in this regard, *Wheeler v. Van Kuren*, 1 Barb. Ch. 490; *Tower v. White*, 10 Paige, 395.

full amount of the judgment and costs, which was refused, and where plaintiff paid into the court the amount tendered, but not enough to cover the interest accrued subsequent to the tender, and plaintiff asked to be subrogated to his right as a subsequent mortgagee, it was held that all the relief to which the plaintiff is entitled could have been speedily and summarily had in the action of foreclosure on motion, and a subsequent equitable action will not lie.²⁶²

§ 5899. **Defense—Conditional deed.**—Where the answer, while averring that the deed was a conditional deed, admits that the money was received by defendant on the understanding that if the money was repaid in six months, with interest, plaintiff was to reconvey, and does not specifically deny that the money was loaned, it was held that it virtually admitted the loan. The allegation in the answer that unless the money was returned the property should remain in the plaintiff does not change the nature of the contract.²⁶³

§ 5900. **Defense—Condition against public policy.**—A person who conveys land upon an unlawful condition subsequent, and then purchases it back, and executes a mortgage for the purchase money, cannot resist the enforcement of the mortgage on the ground that the condition subsequent was against public policy, or that there was a want of consideration.²⁶⁴

§ 5901. **Denial of condition.**—In a foreclosure action, the complaint set forth the condition of the bond, and alleged that the mortgage was executed “with the same conditions as the bond.” The answer denied that the mortgage contained the condition, repeating it as stated in the complaint. It was held insufficient on demurrer. It was not a denial that the mortgage contained, by reference to the bond or otherwise, substantially the same condition. To raise that issue, the defendant should have denied the deeds, or set forth the condition of the mortgage *in hæc verba*, that the court might see what it was.²⁶⁵

§ 5902. **Denial of delivery.**—Although an answer denies the delivery of a bond and mortgage, still their possession by plain-

²⁶² Ketchum v. Crippin, 37 Cal.
223.

²⁶³ Lee v. Evans, 8 Cal. 424.

²⁶⁴ Patterson v. Donner, 48 Cal.
369.

²⁶⁵ Dimon v. Dunn, 15 N. Y. 498.

tiff is evidence of delivery.²⁶⁶ An answer alleging non-delivery by the mortgagor and want of consideration for the execution of the mortgage states good defenses.²⁶⁷

§ 5903. **Disclaimer.**—In a foreclosure action, a defendant who is not alleged to be personally liable, and who disclaims all interest in the mortgaged premises, cannot demand a judgment against the plaintiff on a note, a bond, or a covenant.²⁶⁸

§ 5904. **Duress of wife.**—The execution by the wife of a mortgage, under compulsion and undue influence of her husband, does not render the mortgage void, but only voidable; and if the mortgage is given to secure an antecedent debt, and the mortgagee has no notice of such compulsion and undue influence, the mortgage cannot be avoided on that ground.²⁶⁹

§ 5905. **Estoppel.**—A mortgagor who mortgages in fee is estopped from denying that the estate mortgaged was other or less than an estate in fee simple.²⁷⁰ If the mortgagee verbally requests the mortgagor not to pay at the bank where the note is made payable, and offers to call for the installments, he is estopped from enforcing the terms of the note if he fails to call for the payments.²⁷¹

§ 5906. **Failure of title.**—An answer in a foreclosure suit which alleges that the mortgage was given to secure the purchase money of said real estate, and that the property was conveyed by warranty deed, with covenants, etc., by the mortgagee to the mortgagor, and that the former had previously granted a right of way to a railroad over a part of the land, but not showing that the defendant had been evicted or suffered any damage or inconvenience on account of such right of way, is bad on demurrer.²⁷²

§ 5907. **Former judgment.**—A judgment that the mortgage is not paid off is not conclusive in another suit as to the amount

²⁶⁶ Blankman v. Vallejo, 15 Cal. 638.

²⁶⁷ Ault v. Blackman, 8 Wash. 624, 36 Pac. 694.

²⁶⁸ National Fire Ins. Co. v. McKay, 21 N. Y. 191. Compare Agate v. King, 17 Abb. Pr. 159.

²⁶⁹ Connecticut Life Ins. Co. v. McCormick, 45 Cal. 580.

²⁷⁰ Vallejo Land Assoc. v. Viera, 48 Cal. 572.

²⁷¹ Lawrence v. Ward, 28 Utah, 129, 77 Pac. 229.

²⁷² Gillfillan v. Snow, 51 Ind. 305.

remaining due.²⁷³ Judgment of foreclosure, entered on stipulation as without prejudice to a claim of paramount adverse title on part of defendant, is no bar to his subsequent assertion of the claim so reserved.²⁷⁴ Omission to set up a prior judgment lien in defense to foreclosure of one incumbrance is no bar to setting up a defense in a suit to foreclose another on the same property.²⁷⁵

§ 5908. **Fraudulent mortgage.**—A mortgage fraudulently given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor.²⁷⁶ An answer by the vendee of mortgaged premises to an action to foreclose the mortgage and to obtain a deficiency judgment against him, under a clause in the deed providing for the assumption of the mortgage debt, which avers that such clause was fraudulently inserted, and that the defendant's agent had no authority to accept a deed containing such a provision, states a good defense, without alleging the tender of a deed back to his grantor upon discovery of the fraud.²⁷⁷ E. made a usurious mortgage to V., who foreclosed and sold to an innocent third party under a power of sale. It was held that E. could not set up the usury against the purchaser.²⁷⁸ Where the defendant pleaded *non est factum* and usury, it was held no defense in foreclosure by *scire facias*.²⁷⁹ If an assignment is secured by fraud, or by violation of a trust, the assignee cannot have a decree of foreclosure for the amount of the note, but only for the amount paid for the assignment.²⁸⁰

§ 5909. **Homestead.**—If husband and wife own a tract of land, part of which is claimed as a homestead, and both execute a mortgage on the whole tract to secure a debt, and the husband afterwards executes a mortgage upon the part not covered by the homestead to secure his debt, and the first mortgagee forecloses, making the other mortgagee a party, the second mortgagee cannot insist that the homestead be sold; but the decree should direct the part not covered by the homestead to be first sold, and if the proceeds satisfy the first mortgage, that the home-

²⁷³ Campbell v. Consalus, 40 Barb. 509.

²⁷⁴ Lee v. Parker, 43 Barb. 611.

²⁷⁵ Frost v. Koon, 30 N. Y. 428.

²⁷⁶ Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102.

²⁷⁷ Sweetzer v. Diehl, 14 Mont. 498, 37 Pac. 10.

²⁷⁸ Elliott v. Wood, 53 Barb. 285.

²⁷⁹ Camp v. Small, 44 Ill. 37.

²⁸⁰ Security Sav. Soc. v. Cohalan, 31 Wash. 266, 71 Pac. 1020.

stead be reserved from sale. The second mortgagee must rely on the surplus, if any, arising from the part not covered by the homestead.²⁸¹

§ 5910. **Husband and wife.**—In a foreclosure suit on a note and mortgage of the homestead executed by husband and wife, the wife alone answered, but did not verify her answer. On suit brought to vacate the decree rendered in the foreclosure suit, the wife having been served with process, cannot complain that her answer was not verified. And her failure, by excusable negligence, to make defense to the foreclosure is no ground to vacate the decree, if it be shown that in fact she had no defense.²⁸²

§ 5911. **Insolvency.**—A mortgagee may enforce his mortgage as against the land, notwithstanding the personal liability of the mortgagor for the debt may be barred by a discharge in insolvency.²⁸³

§ 5912. **Answer.**—An allegation in the answer that the mortgage was annulled by a subsequent mortgage between the same parties should be construed as an allegation of a novation of the new for the old mortgage.²⁸⁴ Every material allegation of the complaint not controverted by the answer is, by the law of most states, taken as true.²⁸⁵ An allegation of a conveyance to secure payment of a note, of land sought to be foreclosed, is not controverted by a general denial in the answer.²⁸⁶

§ 5913. **Literal and conjunctive denials.**—Where the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure this bond, the denials in the answer being literal and conjunctive, the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was

281 *McLaughlin v. Hart*, 46 Cal. 638. See, also, *Barber v. Babel*, 36 Cal. 11, as to effect of renewal by husband on statute of limitations. As to plea of homestead action to foreclose mortgage, see *Hoppe v. Hoppe*, 104 Cal. 94, 37 Pac. 894.

282 *Pfeiffer v. Riehn*, 13 Cal. 643.

283 *Christy v. Dana*, 42 Cal. 174.

284 *Kyle v. Hamilton*, 136 Cal. xix, 68 Pac. 484.

285 *Colo. Code Civ. Proc.*, § 71; *Cal. Code Civ. Proc.*, § 462.

286 *Borcherdt v. FAVOR*, 16 *Colo. App.* 406, 66 Pac. 251.

given to secure the debt evidenced by the bond.²⁸⁷ Where a second mortgagee files a cross-complaint, alleging that he has discovered certain things as to his own ownership of the premises, a denial of the allegations is not a denial of ownership or claim of ownership, but of the discovery.²⁸⁸

§ 5914. **Pre-emption claim.**—If a person residing on public land subject to pre-emption executes a mortgage thereon, and then sells the land to another, who takes possession and afterwards pre-emptes the land and obtains title from the United States, the mortgage cannot be enforced against the title thus acquired from the United States, because the person holding such title did not acquire it through the mortgagor.²⁸⁹ But the case is otherwise with a title subsequently acquired by the mortgagor, even though he may have conveyed it to a third person.²⁹⁰

§ 5915. **Remedy at law.**—To a bill for foreclosure, averring that no proceedings at law have been had, a plea that the complainant before the bill was filed had recovered a judgment for the debt is good. It is not necessary to add that the complainant had not exhausted his remedy at law.²⁹¹

§ 5916. **Sale of part.**—If a mortgage is given on two pieces of land, and the mortgagee enforces it against and sells only one piece, he thereby waives the mortgage lien on the other piece; and if the land sold fails to bring the amount due and costs, and a judgment is docketed for the deficiency, the mortgagor cannot complain.²⁹²

§ 5917. **Cross-complaint.**—In an action to foreclose a mortgage, where a subsequent mortgagee denies that his mortgage is inferior or subject to the lien of the prior mortgage, and for further answer sets out his mortgage and prays for a foreclosure of it, such further answer, though affirmative in form, is in fact a cross-complaint, and the court may treat it as such in its findings.²⁹³ In an action to foreclose a mortgage upon

²⁸⁷ *Blankman v. Vallejo*, 15 Cal. 638.

²⁸⁸ *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

²⁸⁹ *Bull v. Shaw*, 48 Cal. 455.

²⁹⁰ *Christy v. Dana*, 42 Cal. 174.

²⁹¹ *North River Bank v. Rogers*, 8 Paige, 648.

²⁹² *Mascarel v. Raffour*, 51 Cal. 242.

²⁹³ *Wittenbrock v. Parker*, 102 Cal. 93, 41 Am. St. Rep. 172, 36 Pac. 374.

an undivided half-interest in land, a defendant who holds a prior mortgage lien upon the whole land, may file a cross-bill and have summons issued, making a mortgagee of the other half-interest a party defendant, and have a decree rendered therein foreclosing on the whole land.²⁹⁴

§ 5918. **Cross-complaint—Continued.**—A trustee being made a party defendant to a foreclosure suit may file a cross-complaint seeking to have his own lien foreclosed, and such cross-complaint need not be confined to the property covered by the original mortgage.²⁹⁵ If a defendant fails to file a cross-complaint demanding affirmative relief, the court has no jurisdiction to render judgment in his favor against the mortgagor, even though the evidence shows said defendant to be owner of certain of the notes executed by the mortgagor.²⁹⁶

§ 5919. **Signature of guardian.**—In proceedings to foreclose a mortgage against a minor's real estate, the fact that the note and mortgage are not executed by signing the name of the minor thereto, but by signing the name of the guardian as such, is no defense.²⁹⁷

§ 5920. **Statute of limitations, who may plead.**—The statute of limitations requires an action to foreclose a mortgage to be commenced within four years from the time when the cause of action accrued, and the statute commences to run from the time the note is due.²⁹⁸ A mortgage that may become due upon default in paying installments, at option of the mortgagee, does not become due so as to start the period of limitation from date of any such default, unless such option is exercised.²⁹⁹ The time of maturity of the note governs.³⁰⁰ There is no limitation on the time for commencing proceedings to foreclose a trust-deed by

24 L. R. A. 197. Also, *White v. Patton*, 87 Cal. 151, 25 Pac. 270.

294 *Newhall v. Livermore*, 136 Cal. 533, 69 Pac. 248.

295 *United States Mtge. etc. Co. v. Marquam*, 41 Or. 391, 69 Pac. 37, 41.

296 *West v. Shurtliff*, 28 Utah, 337, 79 Pac. 180.

297 *Trutch v. Bunnell*, 5 Or. 504.

298 *Belloc v. Davis*, 38 Cal. 242. Of the method of pleading the statute of limitations in an action brought to obtain redemption of mortgaged premises, see *Fogal v. Pirro*, 10 Bosw. 100, 17 Abb. Pr. 113.

299 *First Nat. Bank v. Park*, 37 Colo. 303, 86 Pac. 106.

300 *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

advertisement and sale.³⁰¹ Where money is loaned without note or writing, and a mortgage given to secure its repayment, though the statute of limitations may run against the debt in two years, it does not bar an action to foreclose the mortgage in less than four years.³⁰² In an action to recover judgment for the amount of the debt secured by mortgage on real estate, and also to foreclose the mortgage, the grantees of the mortgage, purchasers subsequent to the execution of the mortgage, have a right to plead the statute of limitations as to that part of the claim of plaintiff which asks for a decree foreclosing the mortgage and a sale of the mortgaged premises.³⁰³ A party who subsequent to the execution of a mortgage purchases the property from the mortgagor, may avail himself of the statute of limitations as a defense to an action for the foreclosure of the mortgage commenced after the statute has run against the debt secured.³⁰⁴

§ 5921. **Tax-title.**—Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up as a full defense a tax-title, he cannot object afterwards that equity has no jurisdiction over tax-titles.³⁰⁵

§ 5922. **Payment pleaded.**—If payment of the debt is pleaded as a defense, the answer should allege payment to some one authorized to receive the money or capable of discharging the defendant because of such payment.³⁰⁶

§ 5923. **Tender.**—A tender of the amount due on a debt secured by mortgage, made after the debt falls due, does not release the lien of the mortgage.³⁰⁷ An answer in foreclosure alleging that the sums mentioned in the complaint were not due nor unpaid, and that sums had been paid thereon, but the times and amounts the defendant was unable to state, was held sufficient at the trial.³⁰⁸

301 *Foot v. Burr*, 41 Colo. 192, 92 Pac. 236, 13 L. R. A. (N. S.) 1210.

302 *Cookes v. Culbertson*, 9 Nev. 199.

303 *Grattan v. Wiggins*, 23 Cal. 16.

304 *McCarthy v. White*, 21 Cal. 495, 82 Am. Dec. 754; *Low v. Allen*, 26 Cal. 141; *Lent v. Shear*, 26 Cal. 361.

305 *Kelsey v. Abbott*, 13 Cal. 609.

306 *Le Clare v. Thibault*, 41 Or. 601, 69 Pac. 552.

307 *Himmelman v. Fitzpatrick*, 50 Cal. 650.

308 *Whitman v. Foley*, 125 N. Y. 651, 26 N. E. 725; *Abb. Sel. Cas. on Pl.* 474.

§ 5924. **Title acquired after mortgage.**—If a person mortgages public land upon which he is residing, and afterwards obtains a patent to the same from the United States, and then sells, the title acquired by the patent inures to the benefit of the mortgagee, and the mortgage may be enforced against the subsequent purchaser.³⁰⁹

§ 5925. **Existing partnership—Accounting.**—An answer to a complaint on a mortgage foreclosure which avers that the plaintiff and defendants were copartners at the time of the execution of the note and mortgage; that the copartnership still exists, though the business has ceased; that the indebtedness secured by the mortgage was connected with and given to raise funds for the copartnership business, and for the additional purpose of acknowledging the amount due plaintiff on account of advances made by him, there not being facilities at the time for making a full settlement of the copartnership affairs, as was contemplated; that the plaintiff is indebted to the defendants and to the copartnership in a certain sum for money and services rendered the firm, which he agreed to pay, and which grew out of the transactions for which the note was given; that the note, not having been used to raise funds, was but an account stated; and which prays for a dissolution and an accounting,—states facts sufficient on demurrer to constitute a defense to the action.³¹⁰

§ 5926. **Trial.**—A question of prior and paramount adverse title will not be tried in a foreclosure suit, where the claimant was not a party to the mortgage.³¹¹ Defendant having shown no defense, it is error to dismiss the action for laches.³¹² It is not error to hear testimony as to the value of the services of plaintiff's attorney after a motion for judgment in his favor has been sustained.³¹³

§ 5927. **Computing interest.**—The proceeds of the sale should be credited before computing interest where there are several mortgages foreclosed.³¹⁴ In case a redemption is granted by decree, the defendant is entitled to interest on the amount found

³⁰⁹ Christy v. Dana, 42 Cal. 174.
But see Bull v. Shaw, 48 Cal. 455.

³¹⁰ Gassert v. Black, 11 Mont. 185,
27 Pac. 791.

³¹¹ Oates v. Shuey, 25 Wash. 597,
66 Pac. 58.

³¹² Merced Bank v. Price, 145 Cal.
436, 78 Pac. 949.

³¹³ Borchardt v. Favor, 16 Colo.
App. 406, 66 Pac. 251.

³¹⁴ Taylor v. Ellenberger, 134
Cal. 31, 66 Pac. 4.

due in order to redeem, less the costs awarded plaintiff from date of final judgment until plaintiff tenders such amount, or in absence of a tender, until foreclosure sale, ordered to be made in absence of redemption, is made.³¹⁵ From the date of the judgment the interest allowed can be no more than seven per cent.³¹⁶ Interest should be allowed upon taxes paid.³¹⁷

§ 5928. **Appointment of a commissioner.**—The court may by its judgment, or at any time after judgment, appoint a commissioner to sell the incumbered property. Such commissioner must qualify with a bond and oath of office, as required by the order of the court, and must sell the property in the manner provided by law for the sale of like property by the sheriff upon execution; and the usual powers and duties of sheriffs in such matters are imposed upon the commissioner. Upon disqualification of the commissioner, on account of death, absence from the state, or otherwise, the court may appoint an elisor to perform the duties. Such elisor must qualify in the same manner, as ordered by the court.³¹⁸ In naming a commissioner the court does not, and need not, interfere with the office of the sheriff or remove that officer, but simply designates another person to perform certain duties, as the law permits.³¹⁹ Even after the decree is entered directing a sale by the sheriff, and without notice to the defendant, an amendment may be made directing sale by the sheriff or by a commissioner appointed by the court. The order appointing the commissioner may be made subsequent to such amendment, or in it, and its effect is to supersede the appointment of the sheriff.³²⁰ A commissioner may be appointed even though the complaint prays for a sale by the sheriff.³²¹ In Colorado and Washington, it seems that the sheriff is the only officer authorized to make a sale by virtue of a judgment of foreclosure, and the appointment of a commissioner is therefore irregular.³²²

§ 5929. **Foreclosure—Judgment on pleadings.**—In a suit to foreclose a mortgage, where the plaintiff sues simply as a trus-

³¹⁵ *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93.

³¹⁶ *Thrasher v. Moran*, 146 Cal. 683, 81 Pac. 32.

³¹⁷ *Wright v. Conservative Inv. Co.*, 49 Or. 177, 89 Pac. 387.

³¹⁸ Cal. Code Civ. Proc., § 726.

³¹⁹ *Granger v. Sheriff*, 140 Cal. 190, 73 Pac. 816.

³²⁰ *Id.*

³²¹ *McDermot v. Barton*, 106 Cal. 194, 39 Pac. 538.

³²² *Blitz v. Moran*, 17 Colo. App. 253, 67 Pac. 1020; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264.

tee, without naming the *cestui que trust* named in the note and mortgage, an answer alleging that the defendants have no knowledge or information sufficient to form a belief as to whether the plaintiff was trustee for the party named in the note and mortgage, or as to how or when any trust was created, or as to the nature of the trust, if created, but failing to deny the making, execution, and delivery of the note and mortgage, raises no material issue, and the plaintiff is entitled to judgment upon the pleadings.³²³

§ 5930. Decree of foreclosure.—The decree of foreclosure should contain only a statement of the amount due plaintiff, designation of defendants who are personally liable for the debt, and a direction that the mortgaged premises, or such portion thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of the sale, the costs of the action, and the debt. Nothing further is required. All else is ministerial, and is expressly regulated by statute, which is not made clearer or more binding by being copied into the judgment.³²⁴ The decree must contain a direction for sale of the incumbered property; it would be error to enter a mere money judgment for the amount found to be due on the note.³²⁵ If the judgment is by default, the decree can give no relief beyond that demanded in the complaint or bill.³²⁶ The decree may be amended so as to order the sale to be made by either the sheriff or a commissioner appointed by the court, and its effect is to supersede the appointment of the sheriff.³²⁷ Personal judgment cannot be had against the grantee of the mortgagor, he not having assumed the mortgage debt.³²⁸ The decree may order any surplus on sale to be paid into court, subject to the further order of the court.³²⁹

§ 5931. Effect of decree.—A mortgagee purchasing in good faith cannot be deprived of his title by the children of the mort-

323 *Scott v. Sells*, 88 Cal. 599, 26 Pac. 350.

324 Cal. Code Civ. Proc., § 726; *Leviston v. Swan*, 33 Cal. 480; *Hooper v. McDade*, 1 Cal. App. 733, 82 Pac. 1116.

325 *Crim v. Kessing*, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074.

326 *Raun v. Reynolds*, 11 Cal. 14.

327 *Granger v. Sheriff*, 140 Cal. 190, 73 Pac. 816.

328 *California Title Ins. etc. Co. v. Miller*, 3 Cal. App. 54, 84 Pac. 453.

329 *Lockhaven Trust & Safe Dep. Co. v. United State Mtge. etc. Co.*, 34 Colo. 30, 81 Pac. 804.

gagor, without first paying the mortgage debt.³³⁰ A claimant of a prior and paramount title is not bound to plead his title in a foreclosure suit, though made a party defendant and served as such, unless he was a party to the mortgage.³³¹ A default decree of foreclosure will not be vacated on the ground that the mortgage secured one instead of two notes, as alleged in the complaint; and default having been duly entered, service of summons and copy of complaint is presumed.³³² Foreclosure upon and sale of a life estate of the widow does not affect the fee title of the children, though they be made parties to the suit.³³³

§ 5932. Deficiency judgment.—If it appears from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk, in the manner provided in the code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may issue.³³⁴ Such sum must have been made a part of the judgment, in order to make it an adjudication of personal liability; and if not so done, plaintiff is confined to the mortgaged property alone.³³⁵ A motion for deficiency judgment requires no notice further than the original service of summons. The findings as to the amount due are not a judgment *in personam*, but a sufficient basis upon which the court may, upon return of sale, enter a deficiency judgment.³³⁶ The judgment cannot be for a larger amount than that pleaded or admitted.³³⁷

The judgment of foreclosure may provide for payment of a specific amount to the mortgagee plaintiff, and that any surplus shall be applied to pay off the subservient lien of another party who shall have a judgment against the other defendants for any deficiency, and upon such decree, and the sheriff's return showing a deficiency, a judgment for such deficiency may be docketed.³³⁸

³³⁰ Investment Sec. Co. v. Adams, 37 Wash. 211, 79 Pac. 629.

³³¹ Oates v. Shuey, 25 Wash. 597, 66 Pac. 58.

³³² Twigg v. James, 37 Wash. 434, 79 Pac. 959.

³³³ Pryor v. Winter, 147 Cal. 554, 109 Am. St. Rep. 162, 82 Pac. 202.

³³⁴ Cal. Code Civ. Proc., § 726.

³³⁵ Ridgley v. Abbott Q. Min. Co., 146 Cal. xviii, 79 Pac. 833.

³³⁶ Blumle v. Kramer, 14 Okla. 366-373, 79 Pac. 215, 1134.

³³⁷ Chesney v. Chesney, 33 Utah, 503, 94 Pac. 989.

³³⁸ Hooper v. McDade, 1 Cal. App. 733, 82 Pac. 1116.

§ 5933. **Notice of sale.**—Before the sale of property on execution, notice thereof must be given as follows: In case of real property, by posting written notice of the time and place of sale, particularly describing the property, for twenty days, in three public places of the township or city where the property is situated, and also where the property is to be sold, and publishing a copy thereof, once a week for the same period, in some newspaper of general circulation, printed and published in the city or township in which the property is situated, if there be one, or, in case no newspaper of general circulation be printed and published in the city or township, in some newspaper of general circulation, printed and published in the county. If the judgment is made payable in a specified kind of money or currency, the notice must state the kind in which bids may be made at such sale, which must be the same as that specified in the judgment.³³⁹ The requirement of the notices of sale on execution is as much for the benefit and protection of defendant as of plaintiff. The sheriff, or commissioner, has the power, duty, and responsibility of posting and publishing the notices of sale, which necessarily implies the selection of the places where notices are to be posted and the newspapers in which they are to be published. For failure to give such notice in a legal manner, he is subject to a heavy penalty (five hundred dollars) in addition to the actual damages to the aggrieved party.³⁴⁰ A sale the day after that named in the notice is void.³⁴¹ The description in the notice is sufficient where it conforms to that in the judgment, and identifies the land to be sold. Notice of sale for "gold coin," though the decree does not specify any kind of money, is not sufficient departure from the terms of the decree as to require the setting aside of the sale.³⁴²

§ 5934. **Publishing the notice.**—The notice of sale must be published in a newspaper of general circulation in the township in which the land is situated, if there is such a paper printed and published there.³⁴³ The notice must be printed in type not smaller than nonpareil, and be preceded with words printed in black-face type not smaller than nonpareil, describing or expressing in

³³⁹ Cal. Code Civ. Proc., § 692, as amended 1907.

³⁴⁰ Northern C. I. Trust Co. v. Cadman, 101 Cal. 200, 35 Pac. 557.

³⁴¹ Brown v. Belles, 17 Colo. App. 529, 69 Pac. 275.

³⁴² Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902.

³⁴³ Cal. Code Civ. Proc., § 692.

general terms the purport or character of the notice intended to be given.³⁴⁴ But as to all publications made in course of legal proceedings in various courts of the state this act is void and inapplicable. However, it does govern publications made by state officers, commissioners, common councils, boards of trustees, and supervisors, and may be held to govern a sheriff's or a commissioner's sale under execution.³⁴⁵ A newspaper of general circulation is one published for the dissemination of local or telegraphic news and intelligence of a general character, having a *bona fide* subscription-list of paying subscribers, established and published at regular intervals for at least one year prior to the date of the publication of the notice, and not one devoted to the interests, or for the entertainment or instruction, of a particular class, profession, trade, calling, race, denomination, or for any number of such classes, when the avowed purpose is to entertain or instruct.³⁴⁶ It may be in a supplement, if circulated coextensively with the main paper,³⁴⁷ or in a paper printed in a foreign language, if the notice is in English.³⁴⁸

§ 5935. **Conduct of sale.**—The sale must be by the sheriff in the county in which the real property is situated.³⁴⁹ All sales of property under execution must be made at auction, to the highest bidder, between the hours of nine in the morning and five in the afternoon. Only so much property as is necessary can be sold; and neither the officer selling nor his deputy can be interested in any purchase. When the sale is of real property, consisting of several known lots or parcels, they must be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present, may also direct the order in which the real property shall be sold, when such property consists of several known lots or parcels, and the sheriff must follow such directions.³⁵⁰ The doctrine of *caveat emptor* applies to execution sales,³⁵¹ but not to the extent that the sale cannot be impeached on grounds of fraud or misrepresentation.³⁵² The

³⁴⁴ Cal. Pol. Code, § 4459.

³⁴⁵ Estate of Melone, 141 Cal. 331, 74 Pac. 991.

³⁴⁶ Cal. Pol. Code, § 4460.

³⁴⁷ Lent v. Tillson, 72 Cal. 404, 14 Pac. 71; Tully v. Bauer, 52 Cal. 487.

³⁴⁸ Richardson v. Tobin, 45 Cal. 30.

³⁴⁹ Vietzen v. Otis, 46 Wash. 402, 90 Pac. 264.

³⁵⁰ Cal. Code Civ. Proc., § 694.

³⁵¹ Meherin v. Saunders, 131 Cal. 681, 63 Pac. 1084, 54 L. R. A. 272.

³⁵² Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287.

sheriff has no right to sell at private sale.³⁵³ The judgment debtor may require that separate lots be sold separately, and in certain order;³⁵⁴ and the purpose therefor is to enable him to redeem either of the parcels.³⁵⁵ Parties desiring property sold in separate parcels should proceed to that end in accordance with this section; and where one has any equity which he desires to have protected, and fails to present matter to the trial court in proper manner, he cannot be heard afterwards.³⁵⁶ The property may be sold in one parcel after separate known parcels of land are offered for sale separately and no offer or bid is made for either parcel.³⁵⁷ The redemption from sale must be of land sold and according to parcels in which it was sold.³⁵⁸ At any rate, a sale *en masse* is not void, but voidable.³⁵⁹ If a purchaser refuse to pay the amount bid by him, the officer may reject any subsequent bid of such person,³⁶⁰ and may again sell the property at any time to the highest bidder; and if any loss be occasioned thereby, may recover such loss, with costs, from the bidder so refusing.³⁶¹ If the decree calls for sale in one parcel, injury must be shown to persons interested, in order to set aside a sale by parcels.³⁶²

§ 5936. **Postponing sale.**—Where a commissioner appointed to sell property in a foreclosure suit is requested to postpone a sale of certain parcels to two o'clock of the same day, he may refuse to do so without abuse of discretion, if no reason is given why the sale should be postponed.³⁶³

A sale under an order issued more than five years after the entry of the decree of foreclosure, without a revivor, is void.³⁶⁴

³⁵³ Sheehy v. Graves, 58 Cal. 449.

³⁵⁴ Vigoureaux v. Murphy, 54 Cal. 346; Ontario Land etc. Co. v. Bedford, 90 Cal. 181, 27 Pac. 39; Leviston v. Swan, 33 Cal. 480; Bechtel v. Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549.

³⁵⁵ Hibernia Sav. etc. Soc. v. Behnke, 121 Cal. 339, 53 Pac. 812; Miller v. Trudgeon, 16 Okla. 337, 86 Pac. 523.

³⁵⁶ County Bank v. Goldtree, 129 Cal. 160, 61 Pac. 785.

³⁵⁷ Connick v. Hill, 127 Cal. 162, 59 Pac. 832; Marston v. White, 91 Cal.

37, 27 Pac. 588; White v. Crow, 110 U. S. 183, 28 L. Ed. 113, 4 Sup. Ct. 71.

³⁵⁸ Hibernia Sav. etc. Soc. v. Behnke, 121 Cal. 339, 53 Pac. 812.

³⁵⁹ Anglo-Californian Bank v. Cerf, 142 Cal. 303, 75 Pac. 902.

³⁶⁰ Cal. Code Civ. Proc., § 696.

³⁶¹ Cal. Code Civ. Proc., § 695.

³⁶² Summerville v. March, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

³⁶³ Connick v. Hill, 127 Cal. 162, 59 Pac. 832.

³⁶⁴ Dalgardno v. Barthrop, 40 Wash. 191, 82 Pac. 285.

§ 5937. **Effect of sale without notice.**—A purchaser at execution sale, without notice, is not an aggrieved party; for if the sheriff or commissioner was authorized to make the sale, such purchaser may in due time demand his deed.³⁶⁵ The title of the purchaser does not depend upon the sheriff's return, for proof *aliunde* may be made that the sale was valid, and the sheriff's failure to give proper notice does not affect the validity of the sale.³⁶⁶

The action for damages for sale without notice is complete as soon as the officer delivers the certificate of sale to the purchaser at execution sale, if the sale was in fact without notice.³⁶⁷

§ 5938. **Possession of premises.**—A writ of assistance may properly issue to place the purchaser at foreclosure sale into possession after expiration of the time for redemption.³⁶⁸ A mortgagee holding possession *pendente lite* may retain rents and profits to pay off the deficiency judgment.³⁶⁹ Where, on account of misdescription, a purchaser of mortgaged premises gets no record title, the mortgagee may foreclose on the vendor, and by purchase at sale secure legal title and possession of the premises.³⁷⁰ A mortgagee in possession as purchaser cannot be dispossessed so long as the mortgage remains unpaid.³⁷¹

§ 5939. **Title acquired by sale.**—The purchaser of real property at foreclosure sale acquires all the right, title, and interest of the mortgagor,³⁷² subject to the laws in force at the time of the sale.^{372a} Possession taken and held by the purchaser under a void sale, or his assigns, in good faith, makes the purchaser or assignee a mortgagee in possession.³⁷³ Fraudulent purchasers or assignees do not acquire any interest.³⁷⁴ If the trustee of the

³⁶⁵ Kelly v. Desmond, 63 Cal. 517.

³⁶⁶ Raker v. Bucher, 100 Cal. 214, 34 Pac. 654, 849; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475; Harvey v. Fisk, 9 Cal. 93.

³⁶⁷ Raker v. Bucher, 100 Cal. 214, 34 Pac. 654, 849.

³⁶⁸ Taylor v. Ellenberger, 134 Cal. 31, 66 Pac. 4.

³⁶⁹ Cowdery v. London etc. Bank, 139 Cal. 298, 96 Am. St. Rep. 115, 73 Pac. 196.

³⁷⁰ Coughanour v. Hutchinson, 41 Or. 419, 69 Pac. 68.

³⁷¹ Gillett v. Romig, 17 Okla. 324, 87 Pac. 325.

³⁷² Cal. Code Civ. Proc., § 700.

^{372a} Leet v. Armbruster, 143 Cal. 663, 77 Pac. 653.

³⁷³ Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949; Sawyer v. Vermont L. & T. Co., 41 Wash. 524, 84 Pac. 8; Gillett v. Romig, 17 Okla. 324, 87 Pac. 325.

³⁷⁴ Cheney v. Murto, 17 Colo. App. 149, 67 Pac. 340.

mortgaged property buys in contravention of his duties, it is in equity for his *cestui que trust*, regardless of absence of fraud and the amount paid.³⁷⁵ The title of a purchaser is not affected by foreclosure proceedings to which he is not made a party.³⁷⁶

§ 5940. **Void and fraudulent sales.**—A purchaser at a sale on execution under a void judgment is without title.³⁷⁷ While the rule of *caveat emptor* applies to sheriff's sales, yet they may be impeached for fraud or misrepresentation.³⁷⁸ Inadequacy of price is a fact which, in connection with other circumstances, may establish fraud in the officer making the sale; but it is never of itself sufficient to annul such sale, for the judgment debtor still has his right to redeem.³⁷⁹ The presumption is in favor of the order of the lower court that the value given was the full value of the property as stated by plaintiff in his affidavit.³⁸⁰ If property is wrongfully sold by the sheriff, and afterwards repurchased by the one rightfully entitled thereto, the measure of damages against the sheriff is the price paid in repurchasing.³⁸¹ The sheriff should retake the property if the sale is set aside.³⁸² If conducted in a manner which could have been authorized by the court, the sale is not void.³⁸³

§ 5941. **Vacating sale.**—It is proper to refuse to vacate a sale regularly made in pursuance of a decree.³⁸⁴ One having no interest in the land cannot have the sale set aside.³⁸⁵ Purchasers under a judgment rendered against the mortgagors subsequent to the execution of the judgment and a sale of part of the mortgaged premises cannot have the sale set aside for failure to sell as directed by the decree.³⁸⁶ A sale under a trust-deed may be set aside on the ground of non-delivery of the trust-deed, or that

375 Marquam v. Ross, 47 Or. 374, 78 Pac. 698, 83 Pac. 852, 86 Pac. 1.

376 Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196.

377 Sullivan v. Mier, 67 Cal. 264, 7 Pac. 691; Emeric v. Alvarado, 64 Cal. 529, 2 Pac. 418.

378 Webster v. Haworth, 8 Cal. 21, 68 Am. Dec. 287.

379 Smith v. Randall, 6 Cal. 51, 65 Am. Dec. 475; Connick v. Hill, 127 Cal. 162, 58 Pac. 832.

380 Connick v. Hill, 127 Cal. 162, 58 Pac. 832.

381 Blewett v. Miller, 131 Cal. 142, 63 Pac. 157.

382 Orton v. Browne, 113 Cal. 561, 45 Pac. 835.

383 Bechtel v. Wier, 152 Cal. 443, 93 Pac. 75, 15 L. R. A. (N. S.) 549.

384 Taylor v. Ellenberger, 134 Cal. 31, 66 Pac. 4.

385 Humboldt Sav. etc. Soc. v. March, 136 Cal. 321, 68 Pac. 968.

386 Summerville v. March, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

the indebtedness has not accrued when sale was made.³⁸⁷ Inadequate price is no ground, unaccompanied by fraud or restraint.³⁸⁸ Slight evidence of irregularity will not warrant the setting aside of a sale made several years prior.³⁸⁹ The purchaser is entitled to a lien upon the land for taxes he paid prior to the time the sale was declared void.³⁹⁰

§ 5942. **Certificate of sale.**—The officer (sheriff or commissioner) must give to the purchaser a certificate of sale, and file a duplicate thereof for record in the office of the county recorder of the county, which certificate must state the date of the judgment under which the sale was made and the names of the parties thereto, and contain a particular description of the real property sold, the price bid for each distinct lot or parcel, the whole price paid, and if the property is subject to redemption, must state so, and the kind of money, if in any particular kind.³⁹¹ If the copy of the certificate filed is incorrect, a corrected one may be refiled.³⁹² The purchaser receives thereby whatever title the judgment debtor had at the time the judgment, or the attachment prior thereto, became a lien upon the premises, subject only to the right of redemption.³⁹³ Such sale to plaintiff in foreclosure extinguishes the mortgage indebtedness and all interest had in the fire-insurance policy given upon buildings “as further security for said indebtedness.”³⁹⁴

The purchaser should immediately after such purchase take out a new policy upon the buildings, even before the period for redemption expires.³⁹⁵ The transfer is not perfect until delivery of the sheriff's deed, but, by the doctrine of relation, the deed, when executed, is to be deemed and taken as executed at the date when the lien, of which it is a sequence, originated.³⁹⁶ The sheriff's deed does not transfer any title acquired after the date of the execution sale.³⁹⁷ A certificate reciting that a mortgage

387 *Davis v. Bower*, 29 Colo. 422, 68 Pac. 292.

388 *McLain Land etc. Co. v. Swofford Bros.*, 11 Okla. 429, 68 Pac. 502.

389 *Terry v. Furth*, 40 Wash. 493, 82 Pac. 882.

390 *Dalgarno v. Barthrop*, 40 Wash. 191, 82 Pac. 285.

391 Cal. Code Civ. Proc., § 700a.

392 *Bristol v. Hershey*, 7 Cal. App. 738, 95 Pac. 1040.

393 Cal. Code Civ. Proc., § 700; *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158, 48 Pac. 66; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653.

394 *Reynolds v. London etc. Fire Ins. Co.*, 128 Cal. 16, 79 Am. St. Rep. 17, 60 Pac. 467.

395 *Id.*

396 *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680.

397 *Emerson v. Sansome*, 41 Cal.

sale was made on the day named in the notice, when it was made the day after the sale, will be set aside, as a cloud on the title.³⁹⁸

§ 5943. **Rents and profits.**—The purchaser, from the time of the sale until a redemption, or a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But any such rents or profits collected are deducted from the amount required on redemption. Upon demanding, in writing, a verified statement of the purchaser or creditor, or his assigns, of the amounts of such rents and profits received, the period for redemption is extended for five days after such verified statement is furnished to the redemptioner or debtor; and if no such statement is furnished an action for an accounting may be had, and the period of redemption is extended fifteen days from the final determination of such action.³⁹⁹ The tenant in possession is considered a trustee for the purchaser, and his liability may be enforced by a bill in equity.⁴⁰⁰ The judgment debtor or his successor in interest in the property is entitled to its possession until the time for redemption from sale has expired.⁴⁰¹ The occupation of the premises by defendant from the time of sheriff's sale up to execution of the deed renders him *prima facie* liable to plaintiff for rent during that period, where plaintiff purchased at the sale.⁴⁰² The purchaser may sue for the rent as often as it falls due, under the terms of the lease.⁴⁰³ Liability to pay is not relieved by paying the rent to another person.⁴⁰⁴ The complaint should contain the proper allegation and prayer for the decree to divest defaulting defendants of the rents and profits.⁴⁰⁵ Rent money collected by the purchaser at foreclosure sale, for a time prior to the sale, may be recovered from such purchaser, or the tenant be made to pay a second time.⁴⁰⁶

552; Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

³⁹⁸ Brown v. Belles, 17 Colo. App. 529, 69 Pac. 275.

³⁹⁹ Cal. Code Civ. Proc., § 707.

⁴⁰⁰ Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600.

⁴⁰¹ Purser v. Cady, 120 Cal. 214, 52 Pac. 489.

⁴⁰² Webster v. Cook, 38 Cal. 423;

Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600.

⁴⁰³ Reynolds v. Lathrop, 7 Cal. 43; Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74; Walker v. McCusker, 71 Cal. 594, 12 Pac. 723.

⁴⁰⁴ Webster v. Cook, 38 Cal. 423.

⁴⁰⁵ Garretson Inv. Co. v. Arndt, 144 Cal. 64, 77 Pac. 770.

⁴⁰⁶ Bell v. Thompson, 147 Cal. 689, 82 Pac. 327.

§ 5944. **Waste.**—Until the expiration of the redemption period, the court may restrain the commission of waste on the property, by an order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the one entitled to possession to continue to use the premises in the same manner in which they were previously used.⁴⁰⁷ The judgment debtor has a right to remain in the possession of the property until expiration of the time allowed for redemption, and during that time the purchaser can assert no right to possession, unless to restrain the commission of waste on the property, and therefore cannot have an action to recover possession of a building removed from such premises.⁴⁰⁸ The working of a mine is more than the ordinary use of real estate by one in possession, and may be restrained; but the better plan is to have a receiver appointed.⁴⁰⁹

§ 5945. **Redemption.**—The property may be redeemed by the judgment debtor, or his successor in interest, in the whole or in any part of the property sold separately, or by a redemptioner having a subsequent lien by judgment or mortgage on the whole or some part of the property.⁴¹⁰ Such redemption may be made at any time within twelve months after the sale, on paying the purchaser the amount of his purchase, with one per cent per month thereon in addition, together with the amount of any assessments or taxes paid after purchase, and interest thereon; and if the purchaser be also a creditor, with a lien prior to that of the redemptioner, other than the judgment upon which sale was made, the amount of such lien with interest.⁴¹¹ A redemptioner may within sixty days redeem from another redemptioner, on paying the sum paid by him, with two per cent thereon in addition, and the amount of any assessments or taxes paid, with interest, together with the amount of any prior liens held by him, with interest. Written notice of redemption, and of any such liens, taxes, or assessments, must be given to the sheriff, and a duplicate filed with the county recorder, or another redemption may be made without paying such taxes, assessments, or liens. The last redemptioner or his assignee is entitled to a sheriff's deed. The debtor has a full year, but redemptioners have only

⁴⁰⁷ Cal. Code Civ. Proc., § 706.

⁴⁰⁸ People's Sav. Bank v. Jones,

114 Cal. 422, 46 Pac. 278.

⁴⁰⁹ Hill v. Taylor, 22 Cal. 191.

⁴¹⁰ Cal. Code Civ. Proc., § 701.

⁴¹¹ Cal. Code Civ. Proc. § 702.

sixty days from date of sale or a prior redemption. Upon redemption by the debtor from the last redemptioner, such person must give a certificate of redemption, properly acknowledged, to be recorded in the office of county recorder.⁴¹² Payments may be made to the last redemptioner, or to the officer making the sale, for him.⁴¹³ Heirs of a deceased, when not made parties to the foreclosure, may sue the purchaser to recover their interest in the property sold, without paying or tendering the portion of the debt for which their interest was pledged.⁴¹⁴

If an action in foreclosure is taken, any right to sell under a trust is waived, and a decree must allow the grantor to redeem.⁴¹⁵ And a grantor cannot sue in equity to have a deed declared a mortgage without offering to redeem and settle the whole controversy between him and the grantee.⁴¹⁶ The laws in reference to redemption are not *ex post facto* unless expressly so made.⁴¹⁷

§ 5946. **Time for redemption.**—An oral agreement to extend the time of redemption is valid without consideration, if the debtor is lulled into a false security, and thereby permits the time to expire.⁴¹⁸ The grantee in an absolute deed which is in fact a mortgage, having taken sole, exclusive, and open possession, holds an adverse possession which bars an action to redeem after the lapse of the statutory period for title by adverse possession.⁴¹⁹

§ 5947. **Who may redeem.**—The judgment debtor or his successors, or one having a subsequent lien by judgment or mortgage, may redeem.⁴²⁰ In California, a purchaser of land at execution sale is not entitled to redeem from a prior purchaser under foreclosure proceedings, under section 701 of the Code of Civil Procedure, authorizing a judgment creditor having a lien to redeem; for the judgment is satisfied by the sale and the lien

⁴¹² Cal. Code Civ. Proc., § 703.

⁴¹³ Cal. Code Civ. Proc., § 704.

⁴¹⁴ Anrud v. Scandinavian-American Bank, 27 Wash. 16, 67 Pac. 364.

⁴¹⁵ Dubois v. Bowles, 30 Colo. 44, 69 Pac. 1067.

⁴¹⁶ Mack v. Hill, 28 Mont. 99, 72 Pac. 307; Eldridge v. Hoefer 52 Or. 241, 93 Pac. 246.

⁴¹⁷ Malone v. Roy, 134 Cal. 344, 66 Pac. 313; Hooker v. Burr, 137 Cal. 663, 99 Am. St. Rep. 17, 70 Pac. 778,

194 U. S. 415, 48 L. Ed. 1046, 24 Sup. Ct. 706; Bremen Mills v. Bremen, 13 N. Mex. 111, 79 Pac. 806; Geddis v. Packwood, 30 Wash. 270, 70 Pac. 481.

⁴¹⁸ Bristol v. Hershey, 7 Cal. App. 738, 95 Pac. 1040; Mann v. Provident Life etc. Co., 42 Wash. 581, 85 Pac. 56.

⁴¹⁹ Fountain v. Lewiston Nat. Bank, 11 Idaho, 451, 83 Pac. 505.

⁴²⁰ Cal. Code Civ. Proc., § 701.

extinguished.⁴²¹ One holding a substantial interest in the land acquired from the grantor has a right to redeem over a subsequent grantee with knowledge of that right.⁴²² A junior mortgagee not made a party to the suit is only entitled to redeem as against the senior mortgagee.⁴²³ And a junior mortgagee, a party defendant, not having asked or received any affirmative relief, may within the period of redemption foreclose his own mortgage and, under authority of his certificate of sale therein, be entitled to redeem the property.⁴²⁴ If there be more than one mortgagor, or more than one claimant under him, some of whom are not entitled to redeem, any one entitled may redeem a divided or undivided part, according to his interest.⁴²⁵

§ 5948. **Steps of redemption.**—A redemptioner (not a judgment debtor) must first secure a certified copy of the docket of the judgment under which he claims the right to redeem; or, if he redeem upon a mortgage or other lien, a certified note thereof, from the county recorder; and if there has been an assignment, a copy of such assignment, properly verified by the affidavit of himself or of a subscribing witness thereto; also, the affidavit of himself or his agent, showing the amount then actually due on the lien.⁴²⁶ The foregoing is in order to establish his right to tender the money required to redeem; and unless such proof is produced a valid redemption cannot be made.⁴²⁷ The sheriff's deed does not transfer title unless such proof is produced.⁴²⁸ As between the immediate parties to a redemption, the proofs may be waived;⁴²⁹ but these provisions do not apply to judgment debtors and their successors in interest.⁴³⁰ The payment by check which in due time is paid in gold coin, being a common commercial transaction, cannot be contested as no payment, and the question of whose check it is is immaterial.⁴³¹

⁴²¹ Pollard v. Harlow, 138 Cal. 390, 71 Pac. 454, 648.

⁴²² Mercer v. McPherson, 70 Kan. 617, 79 Pac. 118.

⁴²³ Wemple v. Yosemite Gold Min. Co., 4 Cal. App. 78, 87 Pac. 280.

⁴²⁴ Bristol v. Hershey, 7 Cal. App. 738, 95 Pac. 1040.

⁴²⁵ Cal. Code Civ. Proc., § 347; Wadleigh v. Phelps, 149 Cal. 627, 87 Pac. 93.

⁴²⁶ Cal. Code Civ. Proc., § 705.

⁴²⁷ Haskell v. Manlove, 14 Cal. 54.

⁴²⁸ Wilcoxson v. Miller, 49 Cal. 193.

⁴²⁹ Bagley v. Ward, 37 Cal. 121, 99 Am. Dec. 256.

⁴³⁰ Phillips v. Hagart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843; Yoakum v. Bower, 51 Cal. 539.

⁴³¹ Hooker v. Burr, 137 Cal. 663, 99 Am. St. Rep. 17, 70 Pac. 778, 194

§ 5949. **Compensation for improvements.**—A purchaser at foreclosure who makes improvements after an action is commenced to redeem can receive no credit for such improvements.⁴³² The amounts paid for taxes and water assessments should be allowed.⁴³³

§ 5950. **Tender of redemption.**—The purchaser buys with the knowledge that he may be divested of his title by a redemption or a tender of redemption not accepted. The tender is not required to be kept good for purposes of action to regain possession of the premises. The tender itself and its refusal work an instantaneous discharge of the lien, and divest the purchaser of all title, though the debt remains due, with the right left in the purchaser of an action at law for recovery of the money.⁴³⁴ The sheriff is authorized to receive money of the redemptioner or purchaser for a previous redemptioner, but he is not made such an agent as to make it binding upon the purchaser or previous redemptioner to accept the money.⁴³⁵ If the purchaser denies the right to redeem, and is wrong, he is not entitled to his two per cent per month till the time of actual redemption.

§ 5951. **Effect of redemption.**—A redemption made by the mortgagor or his successors in interest operates as a payment of the mortgage debt, and not as an assignment. A second mortgage thereupon becomes a first lien, unless the mortgagee therein was made a party defendant in the foreclosure of the first mortgage.⁴³⁶ And if the junior mortgagee is made a defendant, and buys the property at foreclosure sale, the plaintiff, by securing the mortgagor's title and then redeeming, wipes out the first mortgage and makes the second mortgage a first lien.⁴³⁷ A junior mortgagee redeeming under foreclosure of the first mortgage after certificate is issued, or before, takes interest the same as if the first mortgagee purchaser had assigned the mortgage.⁴³⁸

U. S. 415, 48 L. Ed. 1046, 24 Sup. Ct. 706.

⁴³² *Benson v. Bunting*, 141 Cal. 462, 75 Pac. 59.

⁴³³ *Dubois v. Bowles*, 30 Colo. 44, 69 Pac. 1067.

⁴³⁴ *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653; *Hershey v. Dennis*, 53 Cal. 77; *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac.

843; *Haile v. Smith*, 113 Cal. 656, 45 Pac. 872.

⁴³⁵ *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

⁴³⁶ *Wemple v. Yosemite Gold Min. Co.*, 4 Cal. App. 78, 87 Pac. 280.

⁴³⁷ *Jacobson v. Lassas*, 49 Or. 470, 90 Pac. 904.

⁴³⁸ *Bristol v. Hershey*, 7 Cal. App. 738, 95 Pac. 1040.

§ 5952. **Action to redeem.**—The mortgagor may bring an action to redeem four years after the mortgagee has gone into possession under the mortgage, if there was no foreclosure,⁴³⁹ or may take even a longer time.⁴⁴⁰ Such an adjudication may determine the character of the transaction, though the pleadings do not warrant a judgment for reconveyance.⁴⁴¹ If the holder under the commissioner's deed claims the land free from any right of redemption, there is no need to offer to redeem.⁴⁴² If the court finds the foreclosure sale void, it should allow the plaintiff mortgagor a reasonable time to pay the money and redeem the mortgage, instead of giving a decree for sale and one year for redemption.⁴⁴³ If the grantee repudiates the right to redeem, he should have to bear the court costs, even though the money balance is in his favor.⁴⁴⁴

FORMS—FORECLOSURE OF MORTGAGES ON REAL PROPERTY.

§ 5953. **Lis pendens—Foreclosure.**

Form No. 1660.

[TITLE OF COURT AND CAUSE.]

Notice is hereby given, that an action has been commenced in the superior court of the . . . county of . . . , state of California, by the above-named plaintiff, against the above-named defendant, for the foreclosure of mortgage, made the . . . day of . . . , 19.., by . . . to . . . , and recorded in the office of the county recorder of the . . . county of . . . , state of California, on the . . . day of . . . , 19.., in book . . . of mortgages, page . . . ; and that the premises thereby conveyed, described in said complaint, and affected by this suit are situated in the said . . . county of . . . , state of California, and are described as follows, to-wit: [Description.]

⁴³⁹ Grogan v. Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

⁴⁴⁰ Catlin v. Murray, 37 Wash. 164, 79 Pac. 605.

⁴⁴¹ Murphy v. Murphy, 141 Cal. 471, 75 Pac. 60.

⁴⁴² Benson v. Bunting, 141 Cal. 462, 75 Pac. 59.

⁴⁴³ Sloane v. Lucas, 37 Wash. 348, 79 Pac. 949.

⁴⁴⁴ De Leonis v. Walsh, 140 Cal. 175, 73 Pac. 813.

§ 5954. Complaint in foreclosure of mortgage—Common form.

Form No. 1661.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , in this state, the defendant made his promissory note, bearing date on that day, in the words and figures following, to-wit: [Copy of note.]

II. That the said defendant, to secure the payment of the said principal sum and the interest thereon, as mentioned in said note, according to the tenor thereof, did execute under his hand and seal, and deliver to the said plaintiff, a certain mortgage, bearing date the . . . day of . . . , 19.., and conditioned for the payment of the said sum of . . . dollars, and interest thereon at the rate and at the time and in the manner specified in said note, and according to the conditions thereof; which said mortgage was duly acknowledged and certified, so as to entitle it to be recorded, and the same was afterwards, to-wit, on the . . . day of . . . , 19.., duly recorded in the office of the county recorder of the county of . . . , in volume . . . of mortgages, page . . . ; a copy of which said mortgage, with the indorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III. That the interest on the said principal sum mentioned in said promissory note, and in the said mortgage, has been paid to the . . . day of . . . , 19.., but nothing more has been paid thereon; and the principal sum mentioned in said promissory note and mortgage, together with interest thereon at the rate of . . . per cent . . . , from the . . . day of . . . , 19.., has not been paid by said defendant. *Are now due and wholly unpaid.*

IV. That the plaintiff, on the . . . day of . . . , 19.., or thereabouts, paid on said premises the sum of . . . dollars, for taxes duly assessed thereon, which were a lien and incumbrance upon said premises, legally attaching thereto; and the said sum of . . . dollars, taxes so paid by the plaintiff, and interest thereon at the rate of . . . per cent per . . . , from the . . . day of . . . , 19.., has not been paid by the defendant to the plaintiff.

V. That the plaintiff is now the lawful owner of said promissory note and mortgage.

VI. That the defendants [here insert names of other claimants and incumbrancers] have, or claim to have, some interest or claim upon said premises, or some part thereof [as purchasers,

mortgagees, judgment creditors, or otherwise], which interests or claims are subsequent to and subject to the lien of the plaintiff's mortgage.

Wherefore, the plaintiff prays judgment against the said defendant:

1. For the sum of . . . dollars, with interest at the rate of . . . per cent per . . . , from the . . . day of . . . , 19.., and for costs of suit.

2. That the usual decree may be made for the sale of said premises by the sheriff of said county, according to law and the practice of this court; that the proceeds of said sale may be applied in payment of the amount due to the plaintiff, and that said defendant and all persons claiming under him, subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all rights, claim, or equity of redemption in the said premises, and every part thereof, and that the said plaintiff may have judgment, and execution against the said defendant for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

3. That the plaintiff or any other party to the suit may become a purchaser at said sale; that the sheriff execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the sheriff's deed therefor; and that the plaintiff may have such other or further relief in the premises as to this court may seem meet and equitable.

[Annex copy of mortgage.]

§ 5955. Allegation as to attorney fee.

Form No. 1662.

That plaintiff has incurred a liability to pay the sum of . . . as an attorney fee in the prosecution of this action, and that said sum is a fair and reasonable fee to be paid for said services.

§ 5956. Allegation as to unknown defendants.

Form No. 1663.

That the defendants, John Doe and Richard Roe, claim to have some right, title, interest, or lien in or to said premises; that the

true names of said defendants are unknown to this plaintiff, and they are therefore sued by said fictitious names, and the plaintiff prays that the true names of said defendants, when ascertained, be substituted herein for said fictitious names; that the claim, title, interest or lien of said defendants, John Doe and Richard Roe, if any they have, and all thereof, are subsequent, subject, and subservient to the lien of the mortgage whereon plaintiff brings this action.

§ 5957. Allegation of insurance by plaintiff.

Form No. 1664.

That the defendant [mortgagor] did not keep the premises insured, but on the contrary [suffered the insurance to expire on the . . . day of . . .]; in consequence whereof the plaintiff caused them to be insured in the . . . company, of . . . , for the term of . . . , from the . . . day of . . . , 19.., and paid therefor the premium of . . . dollars.

§ 5958. Complaint in foreclosure of mortgage—Another form.

Form No. 1665.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the defendant executed to the plaintiff a note, conditioned to pay him . . . dollars, in . . . years, with interest at [twelve] per cent per annum, payable [semi-annually].

II. That for securing the payment of the said note, the said . . . executed to the plaintiff a mortgage of the same date, upon certain real property in the county of . . . , described as follows: [Give a description of the property as it should be described in the sheriff's deed.]

III. That on the . . . day of . . . , 19.., the said mortgage was recorded in the office of the county recorder of the county of . . . , in book . . . of mortgages, page . . . , a copy of which said mortgage is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

IV. That on the . . . day of . . . , 19.., the said . . . conveyed the same real property, subject to the said mortgage, to the defendant E. F., who thereupon covenanted with the said

A. B., under his hand and seal, that the said note and mortgage should be paid at maturity.

V. That no part of the principal or interest of the said note and mortgage has been paid.

VI. That the defendant John Doe has or claims some interest in or lien upon the said real property; but the same, whatever it may be, is subject to the lien of the said mortgage.

Wherefore, the plaintiff demands judgment:

1. That each of the defendants, and all persons claiming under any of them, subsequently to the commencement of this action, be foreclosed of all equity of redemption or other interest in the said real property.

2. That the same may be sold, and the proceeds applied to the payment of the amount due on the said note and mortgage, with interest.

3. That if there be any deficiency, the defendants A. B. and E. F. pay the same.

[Annex copy of mortgage.]

§ 5959. Complaint of assignee of mortgagee guaranteeing payment, against mortgagor, grantee assuming payment, and junior incumbrancers.

Form No. 1666.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [As in form No. 1661, substituting mortgagee's name for the words "the plaintiff."]

III. That on the . . . day of . . . , 19.., the defendant [mortgagee], by an instrument in writing under his hand and seal, assigned said note and mortgage to plaintiff, which assignment contained a covenant, of which the following is a copy: [Set it forth.]

IV. That on the . . . day of . . . , 19.., the defendants, A. B. and C. D., entered into an indenture under their hands and seals, whereby the said A. B. conveyed to said C. D. the mortgaged premises, subject to said mortgage, and said C. D. covenanted that he would pay off and discharge the same as a part of the consideration of said conveyance [or otherwise, according to the covenant].

V. That no proceedings have been had, at law or otherwise, for the recovery of said moneys, or any part thereof.

VI. [Where plaintiff holds other liens.] That on the . . . day

of . . . , 19.. , at . . . , in the court of . . . , the plaintiff recovered a judgment, which was duly given by said court against the defendant [designate which], for . . . dollars, in an action wherein this plaintiff was plaintiff [or, defendant], and the said defendant herein was defendant [or, plaintiff]; and which was on the . . . day of . . . , 19.. , duly docketed in the office of the clerk of said county, so as to become, and still remains, a lien on the mortgaged premises.

VII. That the defendants [subsequent incumbrancers] have or claim some interest in, or claim upon said premises, or some part thereof, accrued since the lien of said mortgage.

Wherefore, plaintiff demands judgment:

1. That each of the defendants, and all persons claiming under them, or either of them, subsequent to the execution of said mortgage upon said premises, may be foreclosed of all right, claim, or equity of redemption, or other interest in said mortgaged premises, and every part thereof.

2. That the same be sold, and the proceeds applied to the payment of the costs and expenses of this action, and the amount due on said bond and mortgage, and the amount of said premium and insurance [and of said judgment], with interest on said moneys up to the time of such payment.

3. That the defendant [mortgagor] may be adjudged to pay any deficiency that may remain after applying all of said moneys so applicable thereto.

[Annex copy of mortgage.]

§ 5960. Complaint in action for redemption of real property.

Form No. 1667.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , he executed to the defendant a mortgage upon certain real property in the city of . . . , in the county of . . . , described as follows: [describe it], to secure the payment of . . . dollars in . . . years, with interest at . . . per cent per annum, payable [semi-annually].

II. That on the . . . day of . . . , 19.. , he tendered to the defendant . . . dollars, being the principal of the said mortgage, with interest from the date thereof to that time, and requested the defendant to acknowledge satisfaction for the same, but he refused to do so.

Wherefore, the plaintiff demands judgment:

1. That he be allowed to redeem the said mortgage, upon paying to the defendant the amount due thereon.

2. That upon such payment the defendant satisfy the said mortgage of record, that plaintiff recover his costs herein, and for other and further proper relief.

§ 5961. Complaint by lessee in action for redemption of real property.

Form No. 1663.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the defendant [mortgagor], being the owner in fee of the following described premises, leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of said lease the plaintiff entered upon, and ever since has been, and still is, in possession of said premises, and is vested with the unexpired term thereof; which premises are described as follows: [Description of premises.]

II. That on the . . . day of . . . , 19.., said [mortgagor] made to the defendant [mortgagee] a mortgage upon the same premises to secure . . . dollars, payable on the . . . day of . . . , 19..

III. That on the said last-named day the mortgage became due, but has not been paid; and that said [mortgagee] has commenced an action to foreclose the same for such default.

IV. That on the . . . day of . . . , 19.., the plaintiff tendered . . . dollars to said [mortgagee], being the amount due on said mortgage, with interest, and the costs of said action [or proceeding] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused so to do.

Wherefore, the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant [mortgagee] the amount due upon the mortgage; and that, upon such payment, the defendant, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff.

[Annex copy of lease.]

§ 5962. Complaint by mortgagee in possession against parties entitled to redeem, seeking accounting.

Form No. 1669.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege execution of note and mortgage, default, etc., and proceed as follows:]

II. That after the mortgage debt became due as aforesaid, the plaintiff entered into possession of the mortgaged premises, and the receipt of the rents and profits thereof, and has since continued, and still is, in possession.

III. That the said rents and profits have not been sufficient in amount to equal the annual interest upon the said note and mortgage [or state otherwise, as the facts may be].

IV. That the plaintiff has laid out considerable expenditures for permanent improvements upon said premises, to-wit, [stating the general nature and value of same], which he claims should be allowed him as an offset against so much of said rents and profits; and has also paid the sum of . . . dollars for taxes and assessments [or, if any prior lien has been discharged, state the nature of the lien, amount, and time of payment of same]; all of which sums the said plaintiff also claims should be allowed him, and credited on his account against so much of said rents and profits; which several sums, when so applied and credited to the said plaintiff, charging the plaintiff with the amount of the rents and profits so received by him, will leave remaining due to said plaintiff, on his said mortgage, the sum of . . . dollars.

V. That the defendant [junior incumbrancer] has, or claims an interest in said mortgaged premises, under and by virtue of a mortgage thereon from the said defendant [mortgagor] subsequent to the mortgage of the plaintiff; and the defendant Q. R. has, or claims, an interest therein [etc., setting forth generally the interest of the respective parties].

VI. That the plaintiff has applied to the said defendants, [junior incumbrancers], and requested them to pay the plaintiff the said sum so due on the bond and mortgage held by the plaintiff, or to come to an accounting with him thereof for the said rents and profits, [permanent improvements, and advances], and, after the proper charges and credits, pay the said plaintiff what should appear to be due him on his said mortgage; or, in default thereof, to release their right, and equity of redemption in said

mortgaged premises. But the said defendants have hitherto refused and still refuse so to do, or comply with any part of said plaintiff's request.

Wherefore, the plaintiff demands judgment of foreclosure and sale of said mortgaged premises as provided by law; that an account may be taken of the amount due and owing to the plaintiff for principal and interest on his said note and mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by said plaintiff, and also of the expenditures of the said plaintiff for permanent improvements, and for taxes and assessments [or, for the amount so paid for prior incumbrances, etc., as the case may be], that the amount due the plaintiff be adjudged and determined [etc.].

§ 5963. Complaint in action to have deed absolute declared a mortgage and foreclosed.

Form No. 1670.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege existence of the debt, and then allege giving of deed instead of mortgage, substantially as follows:]

II. That the defendants [mortgagors], on or about the . . . day of . . . , 19.., executed, acknowledged, and delivered to the plaintiff a deed in fee simple, whereby the said [mortgagors] conveyed and sold to the plaintiff the following-described premises: [insert description], which said deed was intended and agreed by the parties to be and to operate simply as a mortgage of said premises, and as security for the payment of the debt aforesaid, with interest.

[Other allegations according to the fact.]

Wherefore plaintiff prays:

1. For judgment for the sum of . . . dollars, with interest at the rate of . . . per cent per annum, computed annually from the . . . day of . . . , 19.., and for costs of suit.

2. That the said deed may be adjudged to be a mortgage and a first lien upon said premises for the amount of said debt and interest.

[Continue prayer as in form No. 1661.]

§ 5964. Complaint by grantor to have deed declared mortgage, and to redeem therefrom.

Form No. 1671.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the plaintiff was the owner and in possession of the following-described premises: [insert description], of the value of . . . dollars.

II. That on said day the plaintiff, being in embarrassed circumstances, borrowed of the defendant the sum of . . . dollars for . . . years, with interest at . . . per cent. [If note was given, set forth the fact.]

III. That to secure the payment of said loan the plaintiff executed and delivered to defendant a warranty deed in fee simple of said premises, which deed, though absolute in form, was intended by both plaintiff and defendant to be a mortgage only, and to stand as security for the repayment of said loan, and to serve no other purpose.

IV. That on the . . . day of . . . , 19.., said defendant entered into possession of said premises, under said deed, and has received the rents and profits thereof, and applied the same to his own use, which said rents and profits amount to the sum of . . . dollars.

V. That on or about the . . . day of . . . , 19.., the plaintiff offered to pay said defendant the amount of said loan, over and above the rents and profits so received by him, and requested him to account for the rents and profits of said premises, and to deliver up possession of the same upon being paid whatever sum should be found to be justly due him upon said account; but said defendant then refused, and still refuses, to account with the plaintiff, but insists upon retaining possession of said estate.

VI. That the plaintiff is ready to pay whatever may be justly due on said loan, and hereby offers to bring the money into court for that purpose.

Wherefore, plaintiff demands judgment that an account may be taken of the amount due said defendant, after deducting the rents and profits received, and that upon the payment by plaintiff of the amount so found due, said defendant be required to reconvey said premises to the plaintiff, and for such other relief as may be equitable.

§ 5965. Complaint by junior mortgagee against purchaser under foreclosure of a senior mortgage, plaintiff not being a party to the former action.

Form No. 1672.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., one E. F. executed and delivered to one G. H. a mortgage upon the following-described real estate: [insert description], to secure payment of the sum of . . . dollars and interest, due in . . . years from that date, according to the conditions of a certain promissory note of even date with said mortgage.

II. That on the . . . day of . . . , 19.., a judgment of foreclosure and sale was duly rendered on said mortgage in the . . . court of . . . county, in a certain action then and there pending, and said premises were thereafter duly sold under said judgment to the defendant for the sum of . . . dollars, which sale was thereafter duly confirmed by said court, and a deed duly executed and delivered to the defendant, who ever since has been and is now in possession of said premises.

III. That on the . . . day of . . . , 19.., said E. F. executed and delivered to the plaintiff his promissory note in writing, in the words and figures following: [Set forth copy of note, or plead legal effect.]

IV. That to secure the payment of said note said E. F., on said day, executed and delivered to plaintiff a mortgage, and thereby granted, bargained, and sold to plaintiff the above-described premises, upon condition nevertheless that [here state condition].

V. That said mortgage was duly recorded in the office of the county recorder of . . . county, on the . . . day of . . . , 19..

VI. That said E. F. has not paid the amount secured by said last-named mortgage, as required by the conditions thereof, and that no proceedings have been had at law or in equity for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due thereon the sum of . . . dollars.

VII. That in the said action to foreclose the mortgage under which the defendant claims title to said premises, the plaintiff was not made a party, nor did he appear in the action, nor does the judgment in that action affect his right in the premises.

VIII. That on or about the . . . day of . . . , 19.., the plain-

tiff duly tendered to defendant the amount due on his said foreclosure judgment, with interest to that date, and demanded that defendant release and convey said premises to the plaintiff, and that defendant refused so to do.

Wherefore, the plaintiff demands judgment that he be allowed to redeem said premises upon paying to the defendant the amount of defendant's said judgment, with interest, within a reasonable time to be fixed by the court, and that upon such payment the defendant be required to release and convey to the plaintiff all his right, title, and interest in said premises acquired under said judgment, and under said sale, and that the defendant surrender possession of said premises to the plaintiff, and for such further relief as may be equitable.

ANSWERS.

§ 5966. Denial of mortgage by purchaser from mortgagor.

Form No. 1673.

[TITLE.]

The defendant [purchaser] answers to the complaint:

That he has no information or belief sufficient to enable him to answer the allegations in plaintiff's complaint as to whether the defendant [mortgagor] ever executed the bond and mortgage described in the complaint, or whether the defendant [mortgagee] ever assigned said supposed bond and mortgage to the plaintiff, or whether he is now the lawful owner or holder thereof; and, therefore, this defendant denies that said defendant [mortgagor] at any time executed said alleged bond or mortgage, and denies that said defendant [mortgagee] at any time assigned said alleged bond or mortgage to the plaintiff, and denies that plaintiff is now the owner or holder of said alleged bond or mortgage.

§ 5967. Denial of notice.

Form No. 1674.

[TITLE.]

The defendant answers to the complaint, and alleges:

That plaintiff did not cause his said mortgage to be recorded as alleged, or at all, and that this defendant had no notice, actual

or constructive, of the existence of plaintiff's said mortgage, at or before the time this defendant took his said [conveyance or incumbrance].

§ 5968. Mortgage not assigned.

Form No. 1675.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said . . . did not, by deed duly executed, convey all his right or title, as such mortgagee, in and to the said premises, in manner and form as the said plaintiff hath in his said complaint alleged, or at all.

§ 5969. Nonjoinder of grantee of the mortgagor.

Form No. 1676.

[TITLE.]

The defendant answers to the complaint, and alleges:

That after the execution of said mortgage in the complaint described and on the . . . day of . . . , 19.., he, by deed duly executed, conveyed said mortgaged premises in fee to one R. S., who is now living and still holds said title.

§ 5970. No equitable assignment.

Form No. 1677.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the said A. B. did not assign or transfer to the said defendant the note in said mortgage mentioned, or the money due thereon, in manner or form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

§ 5971. Equity of redemption not assigned.

Form No. 1678.

[TITLE.]

The defendant answers to the complaint, and denies:

That the said A. B. did convey his equity of redemption in and to the said premises in said complaint described in manner or form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all

§ 5972. Answer—Setting up a judgment.

Form No. 1679.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the defendant on the . . . day of . . . , 19.., did recover in the [state the court] in and for the county of . . . , aforesaid, a judgment against the said A. B., for the sum of . . . dollars, his debt, and . . . dollars, his costs in said action.

II. That the said judgment is in full force in law, and wholly due and unpaid, and is and has been a subsisting lien on said premises from the said . . . day of . . . , 19..

§ 5973. Judgment of strict foreclosure against junior incumbrancer who was not a party to original foreclosure action.

Form No. 1680.

[TITLE.]

[After recitals showing trial of the action and the making of findings, which findings should show the fact of the prior mortgage, and the previous foreclosure thereof, to which the defendant was not a party, and the sale thereunder to the plaintiff, and that the purchase money was insufficient to pay the said prior mortgage, continue:]

It is adjudged, that the defendant pay to the plaintiff the sum of . . . dollars, with interest from . . . , 19.., at . . . per cent. and the costs of this action taxed at . . . dollars, within [six] months from the date of service upon him of notice of the entry of this judgment, and that, if said payment is made, said plaintiff convey said premises by a good and sufficient deed of quitclaim to the defendant. But in default of the payment of said principal, interest, and costs within the time limited for that purpose, then said defendant, and all persons claiming through or under him, shall be forever barred and foreclosed of the equity of redemption and all rights or claims in and to said mortgaged premises.

The said premises are particularly described as follows:
[Describe same.]

§ 5974. Decree of foreclosure, order of sale, and appointment of a commissioner.

Form No. 1681.

[TITLE OF COURT AND CAUSE.]

This cause came on regularly to be heard in open court on the

. . . day of . . . , 19.., A. B., Esq., attorney at law, appearing for plaintiff, and none of the defendants appearing, either in person or by attorney; the court having heard all the evidence and proofs produced herein, and duly considered the same, and being fully advised in the premises, and it appearing therefrom to the satisfaction of the court:

First: That the summons in said action, together with a copy of the complaint therein, has been duly served on . . . , defendants in said action, and that all of said defendants have been duly and regularly summoned to answer under the plaintiff's complaint herein; that the time within which said defendants, or either or any of them, may appear herein has expired, and that all of said defendants have made default in that behalf, and that the default of each defendant for not appearing and answering under plaintiff's complaint has been duly and regularly entered herein; that said action has been duly dismissed as to the defendants John Doe and Richard Roe; that due and sufficient proof has been produced herein of all matters and things as required by law.

Second: That on the . . . day of . . . , 19.., the plaintiff herein caused to be filed and recorded in the office of county recorder of said county of . . . , a notice of the pendency of this suit, containing the names of the parties thereto, the object thereof, and also a true and correct description of the lands and premises affected thereby.

Third: That there is now due and owing to the plaintiff, . . . , from the defendants, . . . , under the promissory note, and for money expended under the terms of said mortgage, as set forth and described in plaintiff's complaint, the sum of . . . dollars, principal and interest of said note, and . . . dollars attorney fees, and . . . dollars costs and disbursements herein, aggregating the sum of . . . dollars, and said defendants last named are personally liable for the whole amount thereof; and that said aggregate amount is a valid lien upon the lands and premises in plaintiff's complaint and hereinafter described, and is secured by the mortgage mentioned in said complaint.

Fourth: That each and all of the terms and conditions of said mortgage have been broken by said defendants last named; and that plaintiff is entitled to have said mortgage enforced and foreclosed, and the lands and premises hereinafter described sold in the manner prescribed by law, and the proceeds arising from

such sale applied to and upon the payment of said sum of money so due as aforesaid.

Fifth: That each and all of the allegations and averments in plaintiff's complaint contained are true and correct.

Now, therefore, on motion of . . . , counsel for plaintiff, application therefor having been made,—

It is hereby ordered, adjudged, and decreed, that . . . be and he is hereby appointed a commissioner to sell the incumbered property, and his compensation for such services is hereby fixed at ten dollars; and it is further ordered, that before entering upon his duties as such commissioner he shall take the oath and give an undertaking in the sum of . . . dollars, all as required by law.

It is further adjudged and decreed, that the plaintiff have judgment against defendants, . . . , on said note and mortgage for the sum of . . . dollars, principal, interest, and attorney's fees, and moneys expended under said mortgage and for the sum of . . . dollars, costs of suit; and that said last-named defendants are personally liable for the whole thereof, and the same is a valid lien upon the lands and premises in the complaint and hereinafter described, and is secured by the terms of said mortgage.

It is further adjudged and decreed, that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and attorney fees, money expended under the terms of said mortgage, and costs of this suit, and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction by the said commissioner, in the manner prescribed by law, and according to the course and practice of this court; and that the said commissioner, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on said sale;

That said commissioner, out of the proceeds of said sale, retain his fees and disbursements on said sale, and pay to the plaintiff or his attorney, out of said proceeds, the sum of . . . dollars, costs of this suit, also the further sums of . . . dollars, attorney fees, and . . . dollars, the amount so found due as aforesaid, together with interest thereon at the rate of seven per cent per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same;

That the defendants and all persons claiming, or to claim, from or under them, and all persons having liens subsequent to said mortgage, their heirs and personal representatives, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder, as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of said commissioner's deed.

It is further adjudged and decreed, that the purchaser or purchasers of such mortgaged premises at such sale be let into possession thereof, and any person who, since the commencement of this action, has come into possession under them, or either of them, deliver possession thereof to such purchaser, or purchasers, on production of the commissioner's deed for such premises, or any part thereof, and that in case the said purchaser be refused such possession, a writ of assistance issue without further notice, requiring the sheriff of the county in which the lands are situated to place and maintain the said purchaser in the quiet and peaceable possession of the said lands and premises purchased by him, and the whole thereof.

And it is further adjudged and decreed, that if the moneys arising from the said sale shall be insufficient to pay the amount so found due the plaintiff, as above stated, with interest and costs, and expenses of sale, as aforesaid, the said commissioner shall specify the amount of such deficiency and balance due plaintiff in his return to said sale, and that on the coming in and filing of said return the clerk of this court docket a judgment for such balance against the defendants, . . . , and that the said last-named defendants pay to the plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of seven per cent per annum from the date of said last-mentioned return and judgment, and that plaintiff have execution therefor.

The lands and premises directed to be sold by this decree are situated in the county of . . . , state of California, and are bounded and particularly described as follows, to-wit: [Description.]

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, [and the rents, issues, and profits thereof].

Done in open court this . . . day of . . . , 19..

§ 5375. Oath of commissioner.

Form No. 1682.

[TITLE OF COURT AND CAUSE.]

STATE OF CALIFORNIA, }
COUNTY OF . . . } SS.

Having been appointed by said court a commissioner in the above-entitled action, to sell certain mortgaged property under an order of sale and decree of foreclosure granted, made, and entered in said cause, I, A. B., do solemnly swear that I will faithfully perform the duties of my office as such commissioner.

A. B.

Subscribed and sworn to before me, this . . . day of . . . , 19..

[SEAL.]

C. D., Notary Public.

§ 5976. Commissioner's bond.

Form No. 1683.

[TITLE OF COURT AND CAUSE.]

Know all men by these presents: That we, . . . , as principal, and . . . and . . . , as sureties, are held and firmly bound to the state of California in the sum of . . . dollars, lawful money of the United States of America, to be paid to the said state of California, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and dated this . . . day of . . . , 19..

The condition of the above obligation is such, that whereas an order was made on the . . . day of . . . , 19.., by the superior court of the [city and] county of . . . , state of California, appointing the above-named principal as commissioner in the above-entitled cause, and authorizing said principal to sell certain real estate under the decree of foreclosure of mortgage in said cause, and requiring that a bond be executed by said commissioner in the sum above named:

Now, therefore, if the said . . . , as such commissioner, shall faithfully perform the duties of his office, according to law and the orders of said court, then this obligation to be void, otherwise to remain in full force and effect.

[SIGNATURES.]

[Add qualification of sureties as in form No. 677.]

The foregoing undertaking approved this . . . day of . . . 19..
 . . . , Judge of said court.

§ 5977. Notice of commissioner's sale.

Form No. 1684.

[TITLE OF COURT AND CAUSE.]

Under and by virtue of an order of sale and decree of foreclosure issued out of the superior court of the [city and] county of . . . , state of California, on the . . . day of . . . , 19.., in the above-entitled action, wherein . . . , the above-named plaintiff, obtained a judgment and decree of foreclosure against . . . , said defendants, on the . . . day of . . . , 19.., for the sum of . . . dollars, besides interest and costs, which said judgment and decree was on the . . . day of . . . , 19.., recorded in decree book, volume . . . , of said court, at page . . . et seq., I am commanded to sell at public auction in the manner prescribed by law, all that certain real property situate in the county of . . . , state of California, described as follows: [description]; together with all the improvements thereon and appurtenances thereunto belonging, [and the rents, issues, and profits thereof].

Public notice is hereby given that on . . . , the . . . day of . . . , 19.., at . . . o'clock . . . M. of that day, at [state specific place], I will, in obedience to said order of sale and decree of foreclosure, sell the above-described property to the highest and best bidder for cash, in gold coin [or, lawful money] of the United States.

[DATE.]

A. B., Commissioner appointed by said court.

§ 5978. Verified report of commissioner's sale.

Form No. 1685.

[TITLE OF COURT AND CAUSE.]

To the Honorable the Superior Court of the County of . . . ,
 State of California:

A. B., the commissioner appointed by the judgment and order of this court in the above-entitled action, to sell the incumbered property described in the order of sale and decree of foreclosure and sale, given, made, and entered in said action, and hereinafter

particularly described, respectfully makes the following report and account of sale made by him under said order and decree:

First: That in pursuance of said order of sale hereunto annexed, and of the decree of foreclosure and sale and judgment of this court, before entering upon his duties as such commissioner, he was, immediately after his said appointment, duly and regularly sworn, on the . . . day of . . . , 19.., to faithfully perform his duties as such commissioner; that on the same date he gave and filed an undertaking with two sufficient sureties, in the sum of . . . dollars, approved by the judge of said court.

Second: That he advertised the sale of the property to be sold, and which is described as follows, to-wit: [description], all situate in the county of . . . , state of California, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, to be sold by him at [state particular place], in the county of . . . , state of California, on the . . . day of . . . , 19.., at . . . o'clock . . . m. of that day.

That previous to said date of sale, to-wit, on . . . , 19.., he posted, and caused to be posted, written notices, particularly describing the property to be sold, the time and place of sale, stating that the same would be sold at public auction, and the kind of money in which payments were to be made; that said notices were posted for more than twenty-one days continuously next preceding the date set for said sale; that three of said notices were posted in three public places in the township in which said property is situated; that three of said notices were posted in three public places in the township in which said sale was advertised to take place; also, that a copy of said notice was published once a week for the same period in the . . . , a newspaper published weekly [or, daily] in the township wherein said property to be sold is situated, all of which advertising of said sale will more fully appear from the affidavits hereto annexed, marked respectively "A," "B," and "C," and made a part hereof.

Third: That at the time and place of holding such sale aforesaid, to-wit, on the . . . day of . . . , 19.., at . . . o'clock . . . m., he attended and offered and exhibited said premises for sale in parts and parcels, but received no bid; that he thereupon offered said premises in one lot or parcel at public auction, according to law, to the highest and best bidder, for cash in gold coin [or, lawful money] of the United States, when said plaintiff,

. . . , being the highest and best bidder therefor, the said premises were struck off by said commissioner to said . . . , for the sum of . . . dollars in United States gold coin, which was the whole price bid, and which said commissioner acknowledges to have received; that he delivered unto said purchaser a certificate of sale of said premises, and filed and recorded a duplicate thereof in the office of the county recorder of said . . . county; that said certificate so delivered contained a particular description of the real property sold, the price bid and for each distinct lot or parcel, the whole price paid, and stated that said real property was sold subject to redemption, and the kind of money in which said redemption may be made, which was the same as that specified in the decree of foreclosure and order of sale; and that said sale was openly and fairly made and conducted.

Fourth: And said commissioner further reports that he deducted from said sum of . . . dollars, the sum of ten dollars, as his compensation fixed by the court for services as such commissioner, and the further sum of . . . dollars, the accrued costs and expenses of sale, amounting in all to . . . dollars deducted, leaving a net balance of . . . dollars, which net balance said commissioner has paid to the plaintiff pursuant to said decree of foreclosure and order of sale, in full [or, part] satisfaction thereof, and receipt for which said net balance is hereunto attached, marked "Exhibit D."

That "Exhibit E," hereunto annexed, is a true and correct account of said sale.

That there remains a balance due upon said judgment and decree of foreclosure, after applying the proceeds of said sale as aforesaid, the sum of . . . dollars, to be entered as a deficiency.

[VERIFICATION.]

A. B., Commissioner appointed by said court.

[Annex copies of exhibits.]

§ 5979. Commissioner's certificate of sale on foreclosure.

Form No. 1686.

[TITLE OF COURT AND CAUSE.]

I, A. B., the commissioner appointed in said action, do hereby certify, that under and by virtue of an order of sale and judgment and decree of foreclosure and sale issued out of the superior court of the [city and] county of . . . , state of California, in

the action wherein . . . is plaintiff, against . . . as defendants, which judgment is dated the . . . day of . . . , 19.., and is in favor of said plaintiff and against said defendants [name defendants against whom judgment is rendered]; and which order of sale was duly attested on the . . . day of . . . , 19.., and to me, as such commissioner, duly directed and delivered, whereby I was commanded to sell the property hereinafter described, according to law, and to apply the proceeds of such sale towards the satisfaction of the judgment in said action, amounting to the sum of . . . dollars, with interest and costs of suit;

That on the . . . day of . . . , 19.., at . . . o'clock . . . M. at the . . . in the city of . . . , in said county of . . . , state of California, I duly sold said property hereinafter described at public auction, according to law, and after due and legal notice given of said sale, unto . . . , who made the highest and best bid therefor at such sale, for the sum of . . . dollars, which was the whole sum paid by him for the real estate in said order of sale mentioned, and lying and being in said county of . . . , state of California, and described as follows, to-wit: [Description.]

And I do hereby further certify, that the said property was offered for sale in separate parcels, but no bid was received therefor; that the same was then sold in one lot or parcel, and that the sum of . . . dollars was the highest bid made, and the whole price paid therefor; and that the same is subject to redemption in gold coin [or, lawful money] of the United States of America, pursuant to the statute in such case made and provided.

Given under my hand this . . . day of . . . , 19..

A. B., Commissioner appointed by said court.

CHAPTER CXXXVIII.

FORECLOSURE OF CHATTEL MORTGAGES.

§ 5980. **Chattel mortgage defined.**—A mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. If an actual change of possession occurs, it becomes a pledge.¹ That property is certain or specific which is capable of being made certain.² The contract must be in writing, and executed in accordance with the statutory requirements,³ but the property itself may be adversely held by another.⁴ But only the rights of those who hold or claim under the mortgagor can be determined.⁵ The contract of mortgage itself does not bind the mortgagor personally, unless so specified therein;⁶ but he may assume personal liability for charges recited in the mortgage which are not covered by the mortgage or secured by lien upon the property.⁷ The assignment of a debt secured by mortgage carries with it the security.⁸

The acceptance of a mortgage is necessary to the same extent as an acceptance of other deeds,⁹ and also a consideration.¹⁰ An antenuptial debt of the husband is not sufficient consideration for a mortgage given by the wife; but a debt due from a third person to the mortgagee,¹¹ or a credit on a former decree and foreclosure sale, is sufficient.¹²

The distinctive feature of a mortgage is that it is security for the performance of an agreement, usually to pay money, and in the absence of which there is no mortgage.¹³ The title remains in the mortgagor until divested by foreclosure and sale.¹⁴ The

1 Cal. Civ. Code, §§ 2920, 2924.

2 Higgins v. Higgins, 121 Cal. 487,
66 Am. St. Rep. 57, 53 Pac. 1081.

3 Cal. Civ. Code, § 2922.

4 Cal. Civ. Code, § 2921.

5 Houghton v. Allen, 75 Cal. 102,
16 Pac. 532.

6 Cal. Civ. Code, § 2928.

7 Russel v. Findley, 122 Cal. 478,
55 Pac. 143.

8 Cal. Civ. Code, § 2936.

9 Rawlins v. Ferguson, 133 Cal. 470,
65 Pac. 957.

10 Chaffee v. Browne, 109 Cal. 211,
41 Pac. 1028.

11 Banta v. Wise, 135 Cal. 277, 67
Pac. 129.

12 De Celis v. Porter, 65 Cal. 3, 2
Pac. 257, 3 Pac. 120.

13 Henley v. Hotaling, 41 Cal. 22;
Manasse v. Dinkelspiel, 68 Cal. 404, 9
Pac. 547; Ahern v. McCarthy, 107 Cal.
382, 40 Pac. 482.

14 Alferitz v. Ingalls, 83 Fed.
964; Shoober v. De Motta, 112 Cal.
215, 53 Am. St. Rep. 207, 44 Pac. 487;

lien does not cover the increase of animals unless expressly mentioned.¹⁵ The term "sheep and increase thereof" includes wool as well as lambs.¹⁶

§ 5981. **What may be mortgaged.**—Since the code amendment of 1909, mortgages may be made upon all growing crops, including grapes and fruit, and upon any and all kinds of personal property, except—1. Personal property not capable of manual delivery; 2. Articles of wearing-apparel and personal adornment; and 3. The stock in trade of a merchant.¹⁷

§ 5982. **Bill of sale as chattel mortgage.**—Where a bill of sale of personal property is intended as a mortgage, but is not executed, witnessed, and acknowledged as a conveyance of real property, as required by statute, it is invalid.¹⁸ But a bill of sale absolute on its face may be a mortgage, and it may be shown by parol evidence to be such.¹⁹ Whether a bill of sale of chattels for a pre-existing debt is a mortgage depends upon the intention of the parties, and is a question of fact for the jury.²⁰ A chattel mortgage does not pass title to the mortgagee unless it so provides.²¹

§ 5983. **Mortgage or pledge.**—Where a chose in action is assigned and delivered as collateral security for the payment of a debt due the assignee, the assignment and delivery to the assignee of the chose in action are necessary to give the latter full authority to readily control the security and make it available; but this does not necessarily constitute the transaction a chattel mortgage as distinguished from a pledge.²² When a mortgagee is given possession, the mortgagor, in addition to mortgaging the land, pledges it as security for the debt.²³ The term

First Nat. Bank v. Erreca, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926; Hixon v. Hubbell, 4 Okla. 224, 44 Pac. 222; Knowles v. Herbert, 11 Or. 54, 240, 4 Pac. 126.

¹⁵ Shoovert v. De Motta, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487; First Nat. Bank v. Erreca, 116 Cal. 81, 58 Am. St. Rep. 133, 47 Pac. 926; Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460.

¹⁶ Alferitz v. Ingalls, 83 Fed. 964. Contra, Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460.

¹⁷ Cal. Civ. Code, § 2955; Cal. Stats. 1909, p. 34.

¹⁸ Or. B. & C. Codes, § 5630; Culver v. Randle, 45 Or. 491, 78 Pac. 394.

¹⁹ Miller v. Campbell, 13 Okla. 75, 74 Pac. 507.

²⁰ Cook v. Lion Fire Ins. Co., 67 Cal. 368, 7 Pac. 784.

²¹ Summerville v. Stockton Milling Co., 142 Cal. 529, 76 Pac. 243.

²² Gay v. Moss, 34 Cal. 125.

²³ Spect v. Spect, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137.

“mortgage” does not include pledge, as it cannot properly be applied to security dependent upon possession of the creditor.²⁴

Under section 246 of the California Practice Act,^{24a} if commercial paper be mortgaged, the mortgage may be foreclosed, and the securities sold under the decree, and by sections 217 and 220,^{24b} such securities may be seized and sold under execution on a judgment at law.²⁵

§ 5984. Priority.—As a general rule in cases of successive chattel mortgages upon the same property, the one first filed is entitled to priority.²⁶ A., the owner of a quartz-mill in Amador county, executed a mortgage on the same to B. Afterwards A. purchased at Sacramento a steam-engine and boiler, and, to secure the purchase money, executed to C. a chattel mortgage on the same, and then transported them to Amador and placed them in the quartz-mill, so that they became a part of the realty. It was held that C.’s mortgage on the steam-engine and boiler had priority over the mortgage of B.²⁷ If at the time of the execution and delivery of a promissory note the payor also gives the payee a bill of sale of personal property by way of mortgage to secure the note, and also delivers possession of the property, the payor has a right to have the property mortgaged applied in satisfaction of the debt; and if the payee sells any of the property, the payor has a right to have the proceeds or value applied towards the satisfaction of the debt.²⁸

§ 5985. For future advances.—A mortgage given in good faith, for the purpose of securing future advances expected to be made, is a good and valid security.²⁹ Such mortgage need not express its object on its face, although it would be better if it does. But a mortgage knowingly given for a greater sum than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mort-

²⁴ Rohrbough v. Johnson, 107 Cal. 144, 40 Pac. 37.

^{24a} Cal. Code Civ. Proc., § 726.

^{24b} Cal. Code Civ. Proc., §§ 688, 691.

²⁵ Davis v. Mitchell, 34 Cal. 87; cited in Donohoe v. Gamble, 38 Cal. 352, 99 Am. Dec. 399. As to what personal property may be mortgaged, see Cal. Civ. Code, § 2955, as amended 1909. As to form of mortgage, and

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when void as to third persons, see Cal. Civ. Code, §§ 2956, 2957.

²⁶ Pittock v. Jordan, 19 Or. 7, 13 Pac. 510.

²⁷ Tibbetts v. Moore, 23 Cal. 208.

²⁸ McGarvey v. Hall, 23 Cal. 140.

²⁹ Lemon v. Wolff, 121 Cal. 273, 53 Pac. 801; Tapia v. Demartini, 77 Cal. 383, 11 Am. St. Rep. 288, 19 Pac. 641; Banta v. Wise, 135 Cal. 277, 67 Pac. 129.

gagor.³⁰ The liability under the mortgage is no more than the amount of the money actually advanced, with interest.³¹

§ 5986. **Execution of chattel mortgage.**—If the statute specifies what personal property may be mortgaged, and the manner of executing the mortgage, such statute should be consulted;³² for a mortgage upon other property, or executed in a different manner, will not be good as against subsequent purchasers or incumbrancers for value and without notice,³³ unless it is delivered into the possession of the mortgagee,³⁴ although it will hold good between the parties, their heirs, legatees, and personal representatives.³⁵ Real property cannot be mortgaged by a chattel mortgage,³⁶ nor personal property by a real estate mortgage, unless executed and recorded as required for all chattel mortgages.³⁷ Failure to comply with the statutory provisions does not, however, render the chattel mortgage invalid as against creditors of a subsequent purchaser of the mortgaged property who assumes the mortgage debt.³⁸

Section 456 of the Civil Code of California confers upon "railroad corporations" the power to mortgage their property; but it cannot be construed to give power to mortgage their franchises and real and personal property as an entirety, and they cannot be mortgaged in one instrument, as a real estate mortgage.³⁹

³⁰ *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102. As to mortgage to secure the purchase money of the articles mortgaged, see *Blaisdell v. McDowell*, 91 Cal. 285, 25 Am. St. Rep. 178, 27 Pac. 656.

³¹ *Voga v. Caminetti*, 65 Cal. 438, 4 Pac. 435.

³² Cal. Civ. Code, §§ 2955 (as amended 1909), 2956, 2957; Alaska Codes, pt. 5, ch. 11, §§ 73-118; Ariz. Civ. Code, pars. 3260-3302; Colo. Mills' Stats., §§ 385-394; Idaho Rev. Codes, §§ 3406-3420; Mont. Rev. Codes, §§ 5747-5773; Nev. Comp. Laws, §§ 2705-2715; N. Mex. Comp. Laws, §§ 2360-3960; Or. B. & C. Codes, §§ 5630-5639; Utah Rev. Stats., §§ 150-168; Wash. Bal. Codes, §§ 4557-4560; Wyo. Rev. Stats., §§ 2774-2828.

³³ *First Nat. Bank v. Beley*, 32 Mont. 291, 80 Pac. 256; *Deseret Nat. Bank v. Kidman*, 25 Utah, 379, 95

Am. St. Rep. 856, 71 Pac. 873; Cal. Civ. Code, § 2957.

³⁴ *Rohrbough v. Johnson*, 107 Cal. 144, 40 Pac. 37.

³⁵ *Marchand v. Ronaghan*, 9 Idaho, 95, 72 Pac. 731; *Perkins v. Maier*, 133 Cal. 496, 65 Pac. 1030; Cal. Civ. Code, § 2973; *Johnson v. Hibbard*, 27 Utah, 342, 75 Pac. 737; *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071; *McLeod v. Bar num*, 131 Cal. 605, 63 Pac. 924.

³⁶ *Beeler v. C. C. Mercantile Co.*, 8 Idaho, 644, 70 Pac. 943, 60 L. R. A. 283.

³⁷ *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, 57 Pac. 76; *Simpson v. Harris*, 21 Nev. 353, 31 Pac. 1009.

³⁸ *Talcott v. Hurlbert*, 143 Cal. 4, 76 Pac. 647.

³⁹ *Bishop v. McKillican*, 124 Cal. 329, 71 Am. St. Rep. 68, 57 Pac. 76;

The federal circuit court of appeals has held that section 456 of the California code gives absolute power to railroads to mortgage personal as well as real property for the purposes mentioned, without incumbering it with any of the conditions attached to the chattel mortgage act;⁴⁰ but in reference to a similar Washington statute, the court held that the failure of a trust-deed to comply with the chattel mortgage law of Washington made the mortgage void as to the personal property.⁴¹ The sufficiency of a chattel mortgage cannot be questioned by a mere creditor without process for collection or enforcement of his debt.⁴²

§ 5987. **Crop mortgage.**—The lien of a mortgage on growing crops continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor.⁴³ But this does not apply to the tortious removal of the crop,⁴⁴ nor to its removal by the mortgagee, as provided in the mortgage, for his better protection.⁴⁵

The legislature of California intended to declare in sections 2955 and following of the Civil Code an exclusive mode for the mortgaging of growing crops, and that for the purpose of mortgaging they should be considered as chattels; and a realty mortgage upon the land, with its rents, issues, and profits, does not give a lien, as against a crop mortgage upon the growing crops thereon.⁴⁶

A valid mortgage may be made upon a crop to be raised thereafter;⁴⁷ and such crop mortgage may be made to secure future advances as well as an existing debt.⁴⁸

Hoyle v. Plattsburgh etc. R. R. Co., 54 N. Y. 314, 13 Am. Rep. 595.

⁴⁰ Southern California etc. Ry. v. Union Loan etc. Co., 64 Fed. 450, 12 C. C. A. 215; contra, see, Bishop v. McKillican, 124 Cal. 329, 71 Am. St. Rep. 68, 57 Pac. 76.

⁴¹ Illinois Trust etc. Bank v. Seattle R. R. Co., 82 Fed. 941, 27 C. C. A. 268.

⁴² Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801.

⁴³ Cal. Civ. Code, § 2972; Hogan v. Zanetta, 107 Cal. 27, 40 Pac. 22; Waterman v. Green, 59 Cal. 142.

⁴⁴ Wilson v. Prouty, 70 Cal. 196,

11 Pac. 608; Martin v. Thompson, 63 Cal. 3.

⁴⁵ Summerville v. Stockton M. Co., 142 Cal. 529, 76 Pac. 243; Byrnes v. Hatch, 77 Cal. 241, 19 Pac. 482; Campodonico v. Oregon I. Co., 87 Cal. 566, 25 Pac. 763; Goodyear v. Williston, 42 Cal. 11.

⁴⁶ Simpson v. Ferguson, 112 Cal. 180, 53 Am. St. Rep. 201, 40 Pac. 104; 44 Pac. 484; affirmed in Bishop v. McKillican, 124 Cal. 329, 71 Am. St. Rep. 68, 57 Pac. 76.

⁴⁷ Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679.

⁴⁸ Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801.

A mortgage of land with rents, issues, and profits, includes a growing crop and the proceeds thereof in the hands of a receiver;⁴⁹ but, with the mortgagor in possession, a chattel mortgage on the growing crop, given at any time prior to foreclosure, will defeat the prior mortgage of the land with rents, issues, and profits, as to the crops.⁵⁰

§ 5988. **Removal of property and taking possession.**—If the mortgagor voluntarily removes or permits the removal of the mortgaged property from the county in which it is situated at the time it was mortgaged, the mortgagee may take possession and dispose of the property as a pledge for the payment of the debt, though the debt is not due.⁵¹ Unless the mortgagee, within thirty days after the removal of the mortgaged property to another county, causes the mortgage or a certified copy thereof to be recorded in such county, or else takes possession of the property, it becomes of no effect as to innocent purchasers thereof.⁵² Section 2965 of the California code makes a condition subsequent which may defeat the mortgage as to innocent third parties, even after it had been recorded in the first county.⁵³

§ 5989. **Sale under chattel mortgage.**—Under the Oklahoma statute,^{53a} a chattel mortgagee, when the debt to secure which the mortgage was given becomes due, may foreclose by a sale of the property in the manner prescribed by the mortgage or by proceedings under civil procedure.⁵⁴ Chattel mortgages may be foreclosed by service of the notice therein prescribed, "by the sheriff or other proper officer."⁵⁵ But a constable is without authority to foreclose a mortgage, and the taking of goods by such officer is unlawful.⁵⁶

The purchaser at a sale of personal property surrendered by the mortgagor to the mortgagee, to be sold under the terms of the mortgage, has no right to deduct any debt due her from the mortgagor.⁵⁷ A junior mortgagee cannot complain if he con-

⁴⁹ *Montgomery v. Merrill*, 65 Cal. 432, 4 Pac. 414.

⁵⁰ *Loeke v. Klunker*, 123 Cal. 231, 55 Pac. 993.

⁵¹ Cal. Civ. Code, § 2966.

⁵² Cal. Civ. Code, §§ 2964, 2965.

⁵³ *Fassett v. Wise*, 115 Cal. 316, 47 Pac. 47, 1095, 36 L. R. A. 505.

^{53a} Stats. 1893, § 3264.

⁵⁴ *Pettee v. John Deere Plow Co.*, 11 Okla. 467, 68 Pac. 735.

⁵⁵ Wash. Bal. Codes, §§ 5871, 5872.

⁵⁶ *Jacobson v. Aberdeen Packing Co.*, 26 Wash. 175, 66 Pac. 419.

⁵⁷ *Williams v. Corker*, 144 Cal. 463, 77 Pac. 1004.

sented to the sale of the mortgaged property.⁵⁸ The personal property to be sold as a pledge or under foreclosure must be present at the sale.⁵⁹

§ 5990. Personal property held in trust.—Personal property may be held by the creditor, under absolute transfer, in trust for the debtor, with power in the creditor to sell and reimburse advances made, or to provide funds to meet additional demands of the debtor.⁶⁰ And such a trust is good as against an attaching creditor, if the trustee has an assignment and lien prior in the point of time to that of the attaching creditor.⁶¹ A trust to effect an immediate sale for the benefit of creditors whose debts are due may also be security for debts while the sale is being made.⁶² Such a trust under deed of assignment continues while the debt subsists.⁶³

§ 5991. Jurisdiction.—The justices' courts have concurrent jurisdiction with the superior courts within their respective townships in actions to enforce and foreclose liens on personal property, where neither the amount of the liens nor the value of the property amounts to three hundred dollars.⁶⁴ And where the probate court is given concurrent jurisdiction if the sum does not exceed one thousand dollars, it has the right to foreclose a chattel mortgage for a sum less than that amount.⁶⁵ Where a cross-complaint seeks to have a mortgage on real estate foreclosed in an action brought to contest the foreclosure of a chattel mortgage, and at the same time moves for a change of venue to the county in which the real estate is situated, it is proper for the court to deny the change.⁶⁶

§ 5992. Complaint.—The following complaint is good as against a general demurrer, to-wit: That the note and mortgage were made and delivered by defendant to the payee, who afterwards, before maturity, and for a valuable consideration, assigned

⁵⁸ Atkins v. Boyle, 33 Colo. 434, 80 Pac. 1067.

⁵⁹ Ely v. Williams, 6 Cal. App. 455, 92 Pac. 393.

⁶⁰ Hyatt v. Argenti, 3 Cal. 151.

⁶¹ Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449.

⁶² Sacramento Bank v. Alcorn, 121 Cal. 379, 53 Pac. 813.

⁶³ Handley v. Pfister, 39 Cal. 283, 2 Am. Rep. 449.

⁶⁴ Cal. Code Civ. Proc., § 113.

⁶⁵ Okla. Stats. 1893, § 1562; Stahl v. Wade, 11 Okla. 483, 69 Pac. 301.

⁶⁶ Murphy v. Russell & Co., 8 Idaho, 151, 67 Pac. 427.

and delivered the same to plaintiff, who has ever since been the owner and holder of the same, and that the note is due and wholly unpaid.⁶⁷ An answer in foreclosure alleging the agreement of the mortgagee to exchange the mortgage and notes for other securities is no defense, in absence of an allegation of such an exchange having been made.⁶⁸

§ 5993. **Procedure.**—Where in a mortgage of chattels there is a mode of foreclosure provided, either party may insist that the foreclosure shall be in the manner provided, but such party must comply with the mortgage stipulation on his part.⁶⁹ It must be in accordance with the provisions of law or with the terms of the contract,⁷⁰ and the mortgage may provide for sale of the property in a certain manner.⁷¹ In Oregon, a chattel mortgage may be foreclosed by suit in any county where service may be had on the defendant, notwithstanding the statute providing for a foreclosure by an action at law in the county where the mortgage has been filed.⁷² Under the laws of Montana, an action to foreclose a chattel mortgage and an action to recover possession of the mortgaged property may be united.^{72a} A complaint or petition containing a prayer for judgment on a note, the sale of the property mortgaged to secure it, and the application of the proceeds to the payment of the mortgage debt, although the word "foreclosure" is not used, is equivalent to a suit for foreclosure; and where the stating part of such complaint or petition states sufficient to authorize a foreclosure, and is supported by the evidence, foreclosure will be ordered.⁷³

A mortgage upon the furniture of a lodging-house is valid as between the parties to it, regardless of whether or not it is given for the purpose of securing the purchase price of the property therein described, and a demurrer to a complaint, in an action

⁶⁷ Johnson v. Hibbard, 27 Utah, 342, 75 Pac. 737.

⁶⁸ Mahoney v. Crockett, 37 Wash. 252, 79 Pac. 933.

⁶⁹ Jacobs v. McCalley, 8 Or. 124. As to foreclosure of chattel mortgage under the laws of Utah, see Armstrong v. Broom, 5 Utah, 176, 13 Pac. 364; affirmed in 137 U. S. 266, 34 L. Ed. 648, 11 Sup. Ct. 73. As to foreclosure in equity, see Bennett v. Reef, 16 Colo. 431, 27 Pac. 252;

Clark v. Baker, 6 Mont. 153, 9 Pac. 911.

⁷⁰ Edmisson v. Drumm-Flato Com. Co., 13 Okla. 440, 73 Pac. 958.

⁷¹ Pettee v. John Deere Co., 11 Okla. 467, 68 Pac. 735.

⁷² Commercial Nat. Bank of Ogden v. Davidson, 18 Or. 57, 22 Pac. 517.

^{72a} Clark v. Baker, 6 Mont. 153, 9 Pac. 911.

⁷³ Graham v. Blinn, 3 Wyo. 746, 30 Pac. 446.

to foreclose the mortgage, on the ground that the complaint is ambiguous in that it fails to show that the mortgage was given to secure the payment of the purchase price of the property, is properly overruled.⁷⁴ An action will lie to foreclose a chattel mortgage, although it may contain a power of sale, and although the mortgagee may recover possession of the property by action.⁷⁵ Nor is it necessary to make a demand for satisfaction before proceeding to foreclose.⁷⁶ A complaint in an action to redeem from a chattel mortgage which alleges that after the maturity of the debt the assignee of the mortgagee took possession of the property and has ever since held possession, treating it as his own and selling portions thereof, but which does not allege any facts showing that in taking possession the defendant in any manner violated the terms of the mortgage or otherwise wrongfully converted the property, fails to show grounds for equitable relief.⁷⁷

§ 5994. **Answer.**—If defendant alleges that plaintiff took possession of certain chattels and converted them to his own use, allowing defendant certain credit on his note therefor, he cannot, in absence of an allegation that such taking of possession was unlawful or wrongful or fraudulent, demand a larger credit than what the chattels sold for.⁷⁸ A mortgagor defendant cannot complain of the description of the property as indefinite.⁷⁹ If a part only of the money has been received, the mortgagor may have a set-off for the part not received.⁸⁰

§ 5995. **Enjoining foreclosure.**—The mortgagee's right to foreclose as well as the amount due may be contested by any person interested in so doing, and for that purpose an injunction may be issued.⁸¹ The complaint must show the interest of complainant.⁸² The wife may enjoin foreclosure of a crop mortgage executed by the husband alone upon exempt property.⁸³

⁷⁴ *Barker v. Maskell*, 101 Cal. 9, 35 Pac. 641.

⁷⁵ *Forepaugh v. Pryor*, 30 Minn. 35, 14 N. W. 61; *Bennett v. Reef*, 16 Colo. 431, 27 Pac. 252.

⁷⁶ *Budweiser Brewing Co. v. Caparelli*, 38 N. Y. Supp. 972.

⁷⁷ *Crowe v. La Mott*, 14 Mont. 355, 36 Pac. 452.

⁷⁸ *Borchardt v. Favor*, 16 Colo. App. 406, 66 Pac. 251.

⁷⁹ *Brenneke v. Smallman*, 2 Cal. App. 306, 83 Pac. 302.

⁸⁰ *Abernethy v. Uhlman*, 52 Or. 359, 93 Pac. 936.

⁸¹ Wash. Bal. Codes, § 5876; *Idaho Rev. Codes*, § 3418; *Murphy v. Russell etc. Co.*, 8 Idaho, 133, 67 Pac. 421.

⁸² *Kidder v. Beavers*, 33 Wash. 635, 74 Pac. 819.

⁸³ *Kindall v. Lincoln Hardware Co.*, 8 Idaho, 664, 70 Pac. 1056.

§ 5996. **Receiver.**—If a sufficient emergency is made to appear, a temporary receiver may be appointed without notice.⁸⁴ In California, a receiver may be had in an action for the foreclosure and sale of mortgaged property where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.⁸⁵ If the appointment of a receiver will not prove satisfactory, the one having possession of the mortgaged property standing in the relation of a trustee may be enjoined from injuring or disposing of the same.⁸⁶

A crop taken possession of by a receiver appointed during the action, as part of mortgaged property, passes under a mortgage which covers rents, issues, and profits.⁸⁷ An application which shows that the mortgagor is insolvent, that the security is endangered by the forfeiture of a leasehold interest, and that the mortgagor has no defense to the action on the merits, sufficiently shows that the property is in danger of being lost or materially injured.⁸⁸ A receiver may be appointed, either under the general statute for the appointment of receivers,⁸⁹ or under the provision relating to insecurity of the debt secured by chattel mortgage.⁹⁰

§ 5997. **Attorney fee.**—In the foreclosure of a chattel mortgage, the attorney fee, when provided for in the contract of foreclosure, or in the note, is fixed by the court at a reasonable amount, based upon the proofs introduced.⁹¹

§ 5998. **Mortgaged property destroyed or changed.**—If the mortgaged property has been so destroyed, altered, or mixed with other property that it is not capable of identification, a decree of foreclosure upon such property would be useless, and should not be granted.⁹²

§ 5999. **Redemption.**—A mortgagor may release his equity of redemption to the mortgagee by a subsequent agreement; but if

⁸⁴ Haggard v. Sanglin, 31 Wash. 165, 71 Pac. 711.

⁸⁵ Cal. Code Civ. Proc., § 564, subd. 2; Bank of Woodland v. Heron, 120 Cal. 614, 52 Pac. 1007.

⁸⁶ Cal. Code Civ. Proc., § 526.

⁸⁷ Treat v. Dorman, 100 Cal. 623, 35 Pac. 86; Montgomery v. Merrill, 65 Cal. 432, 4 Pac. 414.

⁸⁸ Euphrat v. Morrison, 39 Wash. 311, 81 Pac. 695.

⁸⁹ Wash. Bal. Codes, § 5456.

⁹⁰ Wash. Bal. Codes, § 5878.

⁹¹ Johnson v. Hibbard, 27 Utah, 342, 75 Pac. 737.

⁹² Flanagan Bank v. Graham, 42 Or. 403, 71 Pac. 137, 790.

it appears that the mortgagee has taken advantage of the necessity of the mortgagor, and the consideration is grossly inadequate, the release will be disregarded, and the original relation is held to continue.⁹³ The mortgagor may pay the debt due at any time prior to actual sale of the property and extinguish the lien, and a tender refused also raises the lien.⁹⁴

§ 6000. **Damages for wrongful foreclosure.**—In an action for damages to his store, on account of unlawful seizure under a chattel mortgage, the plaintiff may have as actual damages any loss sustained to his financial standing as a direct result of the wrongful acts, and this damage may extend into the future.⁹⁵ Or the mortgagor is entitled to the amount found due for the conversion, and any additional amount realized by the mortgage on the sale of the goods over and above the amount found due for the conversion, as against the amount of the indebtedness.⁹⁶

FORMS—FORECLOSURE OF CHATTEL MORTGAGES.

§ 6001. Complaint in action to foreclose chattel mortgage.

Form No. 1687.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the said defendant made and executed his certain promissory note, in writing, in the words and figures following, to-wit: [here copy note], whereby he promised to pay plaintiff the sum of . . . dollars, with interest, at the time and in the manner therein specified, in gold coin of the United States, and then and there delivered the said note to the said plaintiff.

II. That at the time and place aforesaid, in order to secure the payment of said promissory note, the said defendant executed and delivered to the said plaintiff his certain instrument in writing, under seal, known as a chattel mortgage, a copy of which is

⁹³ Collins v. Denny Clay Co., 41 Wash. 136, 82 Pac. 1012.

⁹⁴ Litz v. Exchange Bank, 15 Okla. 564, 83 Pac. 790; Thomas v. Seattle etc. Brewing Co., 48 Wash. 560, 125

Am. St. Rep. 945, 94 Pac. 116, 15 L. R. A. (N. S.) 1164.

⁹⁵ Tootle v. Kent, 12 Okla. 674, 73 Pac. 310.

⁹⁶ Jacobson v. Aberdeen Packing Co., 26 Wash. 175, 66 Pac. 419.

hereto annexed as a part of this complaint and marked "Exhibit A," which said chattel mortgage was made in good faith for the purpose aforesaid, without intent to defraud creditors or purchasers, and was verified, acknowledged, and recorded pursuant to the statute in such case made and provided.

III. That the property mentioned and described in said chattel mortgage consisted of [here describe property and where situated].

IV. That no proceedings have been had at law or otherwise for the recovery of said sum and interest, or any part thereof, and the same is still wholly owing and unpaid.

V. That plaintiff has incurred a liability to pay an attorney fee of . . . dollars for the prosecution of this suit, and that said sum is a reasonable amount to pay for said services.

Wherefore the plaintiff prays judgment:

1. That the defendant be foreclosed of all interest, lien, and equity of redemption in said mortgaged property, to-wit, the said goods and chattels.

2. That the same be sold, and that the proceeds thereof be applied to the payment of costs and expenses of this action and of counsel fees, in the sum of . . . dollars, and of the amount due on said note and mortgage, with interest thereon up to the time of payment, at the rate of . . . per cent per month.

3. That the defendant be adjudged to pay any deficiency that may remain after applying all said money as aforesaid, and for such other and further relief as to this court may seem just in the premises.

[Annex copy of chattel mortgage.]

§ 6002. Complaint for foreclosure of chattel mortgage, where there are subsequent incumbrancers.

Form No. 1683.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege the indebtedness and the giving of a note or other evidence thereof.]

II. That to secure the payment of said note the defendant, on the . . . day of . . . , 19.., executed and delivered to the plaintiff an instrument in writing duly signed [and acknowledged] by said defendant, by which he conveyed to the defendant as security for said note the following-described goods and

chattels, viz.: [Describe the goods as in the mortgage, or attach a copy of the mortgage as part of complaint.]

III. That on the . . . day of . . . , 19.., the said instrument was duly filed for record in the office of the [proper officer].

IV. That the defendants, [name subsequent incumbrancers or lienholders], have, or claim to have, some interest in, or lien upon, said mortgaged property, which they, and each of them, claim is superior to the interest of this plaintiff therein, but which are in fact subject and inferior to the plaintiff's said mortgage lien.

V. That the defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt; and there is now due from the defendant to the plaintiff thereon the sum of . . . dollars, with interest from . . . , 19..

Wherefore, plaintiff demands judgment against the said defendant for the sum of . . . dollars, with interest from the . . . day of . . . , 19.., and costs, and that said goods may be ordered sold as provided by law, and the proceeds thereof applied in payment of the amount so adjudged with costs; that the defendant be barred and foreclosed of all right, interest, or lien in or upon said property; and that the plaintiff have such other and further relief as may be just.

§ 6003. Complaint for foreclosure of bill of sale of chattels given as a chattel mortgage.

Form No. 1689.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege indebtedness as in preceding form.]

II. That to secure payment of said indebtedness the defendant [promisor], on the . . . day of . . . , 19.., executed and delivered to the plaintiff a bill of sale of the following-described personal property: [Describe same]; a copy of which bill of sale is attached hereto and marked "Exhibit A"; and that it was then and there understood and agreed by the parties thereto that the same was given, and was to operate, only as a chattel mortgage of the property therein described to secure the payment of said indebtedness; and that if said defendant should pay the said indebtedness at the time and in the manner agreed upon in said note, then the said bill of sale should be null and void.

III. That the said bill of sale was duly filed for record as a chattel mortgage in the [proper office], on the . . . day of . . . , 19..

IV. That the defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt; and that there is now due from the defendant to the plaintiff thereon the sum of . . . dollars, with interest from . . . , 19..

Wherefore, plaintiff demands judgment against the said defendant for the sum of . . . dollars, with interest from the . . . day of . . . , 19.., with costs, and that the said bill of sale be adjudged to be a chattel mortgage upon said property; that the said property be sold according to law, and the proceeds thereof be applied to pay plaintiff's demands.

§ 6004. Notice of chattel mortgage sale.

Form No. 1690.

Notice is hereby given, that whereas default has occurred in the conditions of that certain chattel mortgage executed by A. B., mortgagor, to C. D., mortgagee, [and thereafter assigned to E. F.], bearing date on the . . . day of . . . , 19.., by reason of the failure of said mortgagor to pay the debt secured thereby [or otherwise, state the default according to the facts]; and whereas there is now due and unpaid on said indebtedness to the undersigned the sum of . . . dollars.

Now, therefore, the property described in said mortgage, to-wit, [describe property], or so much thereof as may be necessary, will be sold pursuant to the power of sale in said mortgage contained, at public sale, to the highest bidder for cash, on . . . , the . . . day of . . . , 19.., at . . . o'clock in the . . . noon of said day, at [name place], in the city of . . . , county of . . . , and state of . . . , to satisfy the debt secured by said mortgage, and the costs and expenses of these foreclosure proceedings.

Dated at . . . , this . . . day of . . . , 19..

C. D., Mortgagee.

[Or, E. F., Assignee of said Mortgagee.]

G. H., Agent or Attorney for C. D., Mortgagee.

§ 6005. Report of chattel mortgage sale.

Form No. 1691.

[VENUE.]

I, L. M., [sheriff of the said county of . . .], do hereby certify and report, that pursuant to the annexed notice of sale, and the mortgage therein described, I did, at the time and place designated in said notice, expose for sale at public vendue, to the highest bidder, the property described in said mortgage and notice, and then and there sold the same as follows:

[Name article] to [name purchaser], for the sum of . . . dollars.

[Proceed in the same way with all the articles sold.]

And I do further certify and report, that said bidders were respectively the highest and best bidders, and the said sums so bid by them respectively were the highest and best sums bid at said sale, and that the said sale was fairly conducted, and all of said property present and in view at the time thereof.

That the necessary expenses of seizure, keeping and sale of said property were as follows:

[Give itemized statement thereof.]

That I first paid all of said expenses, to-wit, the sum of . . . dollars, and applied the remainder of the amount received, to-wit, the sum of . . . dollars, upon the said chattel mortgage [and returned the following property, not sold, to A. B., the mortgagor, describe same].

[DATE.]

L. M.

[If sale was made by one not an officer attach the following affidavit:]

[VENUE.]

L. M., being duly sworn, says that he is the person who conducted the sale referred to in the foregoing report, and that said report signed by him is just and correct, and that the same is a complete and correct report and return of all the proceedings had in said foreclosure.

[JURAT.]

L. M.

CHAPTER CXXXIX.

FORECLOSURE OF PLEDGES.

§ 6006. **Pledge defined.**—A pledge is a deposit of personal property by way of security for the performance of another act;¹ and every contract by which the possession of personal property is transferred, as security only, is to be deemed a pledge.² The lien of a pledge is dependent upon possession.³ Possession of bulky articles may be given and the articles remain upon pledgor's land and somewhat under his control.⁴ A third party may hold the pledge, and hold it to secure more than one debt.⁵ But the pledgee has no right to hold the property as security for any other obligation than that for which it was pledged.⁶

The pledgee of stock in a corporation does not thereby become a stockholder or liable for debts of the corporation.⁷ The writing given may purport to transfer title, but if the intent is to vest merely a lien, it will be viewed as a pledge.⁸

§ 6007. **Illegal interest.**—If the law forbids a charge of interest in excess of four per cent per month for loans secured by pledged personal property, if a greater interest is charged, the pledgor may recover his property by tendering the amount of the loan, together with the highest legal rate of interest,—four per cent.⁹

§ 6008. **Personal property held in trust.**—Personal property may be held by the creditor, under absolute transfer, in trust for the debtor, with power in the creditor to sell and reimburse advances made, or to provide funds to meet additional demands of the debtor.¹⁰ And such a trust is good as against an attaching creditor, if the trustee has an assignment and lien prior in point

1 Cal. Civ. Code, § 2986.

2 Cal. Civ. Code, § 2987.

3 Cal. Civ. Code, § 2988.

4 *Sequeira v. Collins*, 153 Cal. 426, 95 Pac. 876.

5 *Ladd v. Myers*, 4 Cal. App. 352, 87 Pac. 1110.

6 *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

7 *Borland v. Nevada Bank*, 99 Cal. 89, 37 Am. St. Rep. 32, 33 Pac. 737; *Knoll v. Melone*, 1 Cal. App. 637, 82 Pac. 982.

8 *Sequeira v. Collins*, 153 Cal. 426, 95 Pac. 876; *Jones v. Evans*, 6 Cal. App. 88, 91 Pac. 532.

9 *Jackson v. Shawl*, 29 Cal. 267.

10 *Hyatt v. Argenti*, 3 Cal. 151.

of time to that of the attaching creditor.¹¹ A trust to effect an immediate sale for the benefit of creditors whose debts are due may also be security for debts while the sale is being made.¹² Such a trust under deed of assignment continues while the debt subsists.¹³

§ 6009. Liability of pledgee.—A pledge is a bailment which is reciprocally beneficial to both parties, and the law therefore requires the pledgee to exercise ordinary diligence in the care and custody of the pledged property, and he is responsible for ordinary negligence.¹⁴ A pledgee upon transferring pledged paper to a third person without authority will be deemed, at election of the pledgor, to have taken it at its face value in satisfaction of the debt, and to have pledged to his assignee his own personal responsibility, and not that of his pledgor, and a subsequent reassignment to such pledgee of the paper will not restore the pledgee to his original rights with the pledgor.¹⁵ The pledgee acquires no title if the pledgor had none.¹⁶

§ 6010. Sale under pledge.—The pledgee may collect what is due to him by a sale of the property pledged, when performance of the act for which a pledge is given is due, in whole or in part.¹⁷ However, the pledgee may entirely disregard the pledge, if he so desires, and sue upon the original debt,¹⁸ and possession of the pledged property does not, in the absence of statute or stipulation to the contrary, change that right.¹⁹

Before sale the pledgee must demand performance of the thing to be done, if the debtor can be found, and must give actual notice to the pledgor of the time and place at which the property pledged will be sold, and in sufficient time to enable the pledgor to attend. However, the notice of sale may be waived by the pledgor, and also the demand.²⁰ The waiver of demand is made by contract, or else by a positive refusal to perform after performance is due.²¹

¹¹ *Handley v. Pfister*, 39 Cal. 283, 2 Am. Rep. 449.

¹² *Sacramento Bank v. Alcorn*, 121 Cal. 379, 53 Pac. 813.

¹³ *Handley v. Pfister*, 39 Cal. 283, 2 Am. Rep. 449.

¹⁴ *St. Losky v. Davidson*, 6 Cal. 643; *Hawley Bros. v. Brownstone*, 123 Cal. 643, 56 Pac. 468.

¹⁵ *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

¹⁶ *Newton v. Cardwell Blue Print etc. Co.*, 41 Colo. 492, 92 Pac. 914.

¹⁷ Cal. Civ. Code, § 3000.

¹⁸ *Farmers & M. Bank v. Copsey*, 134 Cal. 287, 66 Pac. 324.

¹⁹ *Sonoma Val. Bank v. Hill*, 59 Cal. 107; *Ehrlich v. Ewald*, 66 Cal. 97, 4 Pac. 1062.

²⁰ Cal. Civ. Code, §§ 3001-3003.

²¹ Cal. Civ. Code, § 3004.

§ 6011. **Sale by auction.**—The sale of pledged property must be made by public auction, in the manner and upon the notice of sale of personal property under execution. The surplus must be paid to the pledgor upon demand.²² Whenever sale is had at public auction, the pledgee or pledge-holder may purchase at such sale.²³ An invalid sale of pledged property constitutes a conversion.

§ 6012. **Sale of securities.**—A pledgee cannot sell any evidence of debt pledged to him, except the obligations of governments, states, or corporations; but he may collect the same when due.²⁴ An indorsement of negotiable paper by way of collateral security cannot make him liable beyond the amount due upon the debt for which it was put up as security.²⁵ Negotiable instruments, choses in action, stocks, etc., may be so pledged as to be made available to the pledgee for satisfaction of the debt secured.²⁶ The pledgee takes such securities subject to no other or further defenses than those of a *bona fide* purchaser for value.²⁷ The pledgee may sue to recover the debt for which the pledge was given without first exhausting the pledge.²⁸

Although section 3006 of the Civil Code of California prohibits the sale of pledged evidences of debt, the limitation is for the benefit of the pledgor, and he may waive the same.²⁹

§ 6013. **Waiver of demand and notice.**—The pledgee is not required to give notice of sale of pledged property where the pledgor has expressly waived all notice to himself and authorized the pledgee to sell at private sale, as in such case the provisions of the code were superseded by agreement of the parties as well in respect to the notice as to the manner in which the sale should be made.³⁰

§ 6014. **Private sale.**—The term “private sale” does not mean merely a taking over of the property by the pledgee at such price

²² Cal. Civ. Code, §§ 3005, 3008.

²³ Cal. Civ. Code, § 3010.

²⁴ Cal. Civ. Code, § 3006; Kelly v. Matlock, 85 Cal. 122, 24 Pac. 642; Hoult v. Ramsbottom, 127 Cal. 171, 59 Pac. 587.

²⁵ Haber v. Brown, 101 Cal. 445, 35 Pac. 1035.

²⁶ Wright v. Ross, 36 Cal. 414.

²⁷ Payne v. Bensley, 8 Cal. 260, 68 Am. Dec. 318.

²⁸ Ehrlich v. Ewald, 66 Cal. 97, 4 Pac. 1062; Savings Bank v. Middlekauff, 113 Cal. 463, 45 Pac. 840.

²⁹ McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068.

³⁰ Williams v. Hahn, 113 Cal. 475, 45 Pac. 815; Bendel v. Crystal I. Co., 82 Cal. 199, 22 Pac. 1112; Lowe v. Ozmun, 3 Cal. App. 387, 86 Pac. 729.

as he may elect to consider an offer, but a sale conducted in the manner usually and ordinarily followed in relation to private sales of property.³¹ Plaintiff and his assignor being present at time of the private sale, and making no objection, are estopped to object to its validity.³² The pledgee must not sell for an amount less than an offer from another purchaser, even at private sale.³³

§ 6015. **Action to redeem and for accounting.**—A pledgor cannot recover possession of pledged property without paying his debt, even though it be barred by the statute of limitations.³⁴ If the delivery of similar property is sought, the ability of defendant to make such delivery must be pleaded and proved.³⁵ Interest stops from the date of a proper offer made to pay, although the prayer of the complaint does not ask it.³⁶ The time in which redemption may be made should be specified in the decree.³⁷

§ 6016. **Action for damages or claim and delivery.**—For wrongfully parting with the property, or refusing to return it, the pledgor may sue the pledgee for damages, or in claim and delivery to regain the property itself, or may bring a suit to establish and enforce his right of redemption.³⁸ The judgment should be for the value of the property (bonds) at the date of conversion or refusal to return, with a recoupment of damages, less the amount of the debt at the date of the conversion.³⁹ If the conversion by sale of the property on time be ratified by the pledgor, interest on the debt of the pledgor runs to the date the property is paid for by the terms of the sale.⁴⁰ If the pledgee renounces the pledge and claims the property, his act is a conversion of the property.⁴¹

§ 6017. **Foreclosure upon pledge.**—Instead of selling pledged property, a pledgee may foreclose the right of redemption by a judicial sale, under the direction of a competent court, and in

31 *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729.

32 *Rose v. Doe*, 4 Cal. App. 680, 89 Pac. 135.

33 *German-American State Bank v. Spokane-Columbia River R. R. etc. Co.* 49 Wash. 359, 95 Pac. 261.

34 *Puckhaber v. Henry*, 152 Cal. 419, 125 Am. St. Rep. 75, 93 Pac. 114.

35 *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

36 *Chapman v. Benedict*, 3 Cal. App. 399, 86 Pac. 736.

37 *Id.*

38 *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889.

39 *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729.

40 *Demars v. Hudon*, 33 Mont. 170, 82 Pac. 952.

41 *Lowe v. Ozmun*, 3 Cal. App. 387, 86 Pac. 729.

that case may be authorized by the court to purchase at the sale.⁴² The proceedings and their effect are the same as if it were the foreclosure of a mortgage.⁴³ The power to sell a pledge is not exclusive, and being a benefit to the pledgee, may be waived by him, and an action in equity be brought to foreclose the security; and the fact that a deficiency judgment is rendered against the pledgor does not prevent the pledgee from maintaining an action upon the pledgor's agreement for the debt.⁴⁴ A sale by judicial decree may be had without calling upon the pledgor to redeem.⁴⁵ In an action brought to recover a debt secured by a pledge, it is not necessary to tender the pledged property, but it may be retained until judgment is satisfied, and it is not necessary that the judgment should provide that the stock should be surrendered upon such satisfaction.⁴⁶

§ 6018. **Limitations.**—The right to foreclose the lien of a pledgee will lapse if the action is not brought within the time required by the general statute of limitations for bringing an action upon the principal obligation.⁴⁷ The pledgee may, by bringing action upon the principal obligation, keep alive his lien; and if suit is begun and judgment recovered so as to keep alive the principal obligation, the lien of the pledge is not extinguished.⁴⁸

FORMS—FORECLOSURE OF PLEDGES.

§ 6019. Complaint for foreclosure of pledge.

Form No. 1692.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the said defendant made

⁴² Cal. Civ. Code, § 3011; Wilson v. Brannan, 27 Cal. 258; Mauge v. Heringhi, 26 Cal. 577.

⁴³ Donahoe v. Gamble, 38 Cal. 340, 99 Am. Dec. 399; Williams v. Ashe, 111 Cal. 180, 43 Pac. 595.

⁴⁴ Farmers' etc. Bank v. Copsey, 134 Cal. 287, 66 Pac. 324; McArthur v. Magee, 114 Cal. 126, 45 Pac. 1068.

⁴⁵ Wright v. Ross, 36 Cal. 414; Mauge v. Heringhi, 26 Cal. 577; Wilson v. Brannan, 27 Cal. 258.

⁴⁶ French v. McCarthy, 125 Cal. 508, 58 Pac. 154; Sonoma Bank v. Hill, 59 Cal. 107; Allin v. Williams, 97 Cal. 403, 32 Pac. 441.

⁴⁷ Mutual Life Ins. Co. v. Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67; Conway v. Supreme Council, 131 Cal. 437, 63 Pac. 727, 137 Cal. 384, 70 Pac. 223.

⁴⁸ Commercial Sav. Bank v. Hornberger, 140 Cal. 16, 73 Pac. 625.

and delivered to the plaintiff his promissory note, in writing, of which the following is a copy: [Insert copy of note.]

II. That to secure the payment of the said indebtedness, and as collateral security therefor, the defendant, on the . . . day of . . . , 19.. , pledged and delivered to this plaintiff the following-described personal property: [insert description], upon the understanding and agreement then and there made between the said parties that in case the said defendant should well and truly pay the plaintiff the indebtedness aforesaid, with interest as agreed, then the said pledged property should be returned to the said defendant, and the claim of the plaintiff thereon should be released; otherwise, that the said pledge should remain in full force and effect. [State any special agreement made by the parties.]

III. That the said pledge was duly filed for record as a chattel mortgage in the [proper office], on the . . . day of . . . , 19..

IV. That the defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt; and that there is now due from the defendant to the plaintiff thereon the sum of . . . dollars, with interest from . . . , 19..

Wherefore, plaintiff demands judgment against the said defendant for the sum of . . . dollars, with interest from the . . . day of . . . , 19.. , and costs, and that the said pledge be adjudged to be a chattel mortgage upon said property; that said property be sold according to law, and the proceeds of said sale applied to the payment of costs and expenses and the demands of plaintiff herein.

§ 6020. Complaint by pledgor of collateral to recover excess of money collected by pledgee.

Form No. 1693.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the plaintiff, being then indebted to defendant in the sum of . . . dollars, indorsed and delivered to said defendant, as a collateral security for the payment of the same, a certain promissory note [describe note].

II. That at its maturity the note was collected by defendant, and by the application of the moneys so received by him said indebtedness was wholly paid and extinguished.

III. That after payment of said indebtedness there remained in the hands of the defendant a balance of . . . dollars, belonging to this plaintiff, payment of which plaintiff demanded of defendant on the . . . day of . . . , 19.., but no part thereof has been paid.

[DEMAND OF JUDGMENT.]

§ 6021. Defense—Allegation that bailment is held as pledge.

Form No. 1694.

[TITLE.]

The defendant answers to the complaint, and alleges:

That on or about the . . . day of . . . , 19.., the defendant loaned to the plaintiff the sum of . . . dollars, which loan is still due and unpaid, and that the said [property bailed] was thereafter [or, at the time of said loan] delivered by the plaintiff to the defendant as security for the repayment of said loan, and is still held by the defendant for that purpose.

CHAPTER CXL.

FORECLOSURE OF VENDOR'S LIEN.

§ 6022. **Vendor's lien defined.**—The vendor has in all cases an equitable lien upon the estate sold for the unpaid and unsecured purchase money, as between himself and vendee and his successors,¹ unless waived by agreement, express or implied; and if the fraud of the vendee induces the vendor to believe that he has been paid in full when he has not, such vendor may enforce his vendor's lien upon the property sold, and the same rule applies where payment is made in land or notes and mortgages taken in exchange upon the fraudulent representations of the vendee.² A transfer of the contract of sale given by the vendor in trust to pay debts, the surplus to be returned, does not waive the lien.³ The seller of personal property has a lien thereon for the unpaid purchase price, which may be enforced as in case of a pledge; provided, however, that the property must be in his possession when the price becomes due.⁴

§ 6023. **Nature and extent of vendor's lien.**—A vendor's lien is valid against every one claiming under the debtor, except a purchaser or incumbrancer in good faith and for value.⁵ The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee.⁶ The vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money; ⁷ nor by accepting a worthless mortgage note in part payment.⁸ And the lien equally exists, whether the instrument amounts to a conveyance or merely

1 Cal. Civ. Code, §§ 3046-3048.

2 *Gee v. McMillian*, 14 Or. 268, 58 Am. Rep. 315, 12 Pac. 417; *Rhodes v. Arthur*, 19 Okla. 520, 92 Pac. 244.

3 Cal. Civ. Code, § 3047.

4 Cal. Civ. Code, § 3049.

5 Cal. Civ. Code, § 3048. As to purchaser's lien for money paid, in case of a failure of consideration, see Cal. Civ. Code, § 3050.

6 *Sparks v. Hess*, 15 Cal. 186; *Hill v. Grigsby*, 32 Cal. 58. See *Avery v. Clarke*, 87 Cal. 619, 22 Am. St. Rep. 272, 25 Pac. 919; *Claiborne v. Castle*, 98 Cal. 30, 32 Pac. 807; *Waddell v. Carlock*, 41 Ark. 523.

7 Cal. Civ. Code, § 3046.

8 *Rhodes v. Arthur*, 19 Okla. 520, 92 Pac. 244.

to an executory contract.⁹ The execution of two notes for the amount due upon a note and mortgage, when the mortgage is not canceled, will not defeat an action for the foreclosure of the same, commenced after the second notes are due and unpaid.¹⁰ But a vendor's lien does not exist where a mortgage security is taken for the purchase money. The silent lien of the vendor is extinguished whenever he manifests an intention to abandon or not to look to it. And this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land,¹¹ but not in case of a chattel mortgage to secure a part, though such chattel mortgage must be exhausted first.¹² A verbal agreement by the vendee to reconvey the land to the vendor, if he does not pay the purchase price, does not prevent the enforcement of a vendor's lien.¹³

§ 6024. Vendee's lien.—The vendee of real property has a special lien upon property contracted to purchase, independent of possession, for any money paid on the contract which he may be entitled to recover back, in case of a failure of consideration.¹⁴

§ 6025. Parties.—Purchase money is, in equity, a lien on land sold where the vendor has taken no separate security.¹⁵ Married women are included in this rule.¹⁶ And when the vendor has not conveyed the title, his position is analogous to that of a mortgagee.¹⁷ Where three persons are jointly and equally interested in the unpaid purchase price of land, one of them cannot claim and enforce a vendor's lien therefor.¹⁸

§ 6026. Right, when enforced.—The equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place,

⁹ Walker v. Sedgwick, 8 Cal. 398.

¹⁰ Creary v. Bowers, (Cal. Sup. Ct., Jan. Term, 1862), not reported.

¹¹ Hunt v. Waterman, 12 Cal. 301.

¹² Gates v. Green, 151 Cal. 65, 90 Pac. 189.

¹³ Gallagher v. Mars, 50 Cal. 23.

¹⁴ Cal. Civ. Code, § 3050.

¹⁵ Salmon v. Hoffman, 2 Cal. 138,

56 Am. Dec. 322; Hill v. Grigsby, 32 Cal. 55; Chilton v. Braiden's Admx., 2 Black, 458, 17 L. Ed. 304.

¹⁶ Id.

¹⁷ Salmon v. Hoffman, 2 Cal. 138, 56 Am. Dec. 322; Hill v. Grigsby, 32 Cal. 55.

¹⁸ Salomon v. Martin, 17 Colo. App. 60, 67 Pac. 25.

and a sale only in the event of its return unsatisfied, as the justice of the case may require.¹⁹ A holder of a contract for sale of land seeking a strict foreclosure of a lien for the unpaid portion of the purchase price must allow defendant a reasonable time in which to make payments.²⁰

§ 6027. Waiver of lien.—The equitable lien which a vendor of real estate, after an absolute conveyance, has for the unpaid purchase money is waived by the taking of a mortgage to secure the same, although the mortgage is void and cannot be enforced.²¹ B. made a parol gift to his daughter R., who took and kept possession of the same twelve years. She then sold the land to M., receiving his notes therefor, and B., at her request, conveyed the land to M. As against the purchaser, R. had a vendor's lien.²² If sale is made to one with permission to sell to others or to a corporation, and stock is taken in part payment, the vendor's lien is waived.²³

§ 6028. Complaint or bill.—Alleging that the vendor tendered a warranty deed at the end of the specified time, and demanded the payment of the purchase price, and that the purchaser refused to accept the deed or pay the price, sufficiently avers tender of the deed.²⁴ A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules of equity.²⁵ In a bill in equity to enforce the lien, it is not necessary to allege the issuance of execution under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and the return of *nulla bona* to sustain the allegation of insolvency.²⁶

¹⁹ Sparks v. Hess, 15 Cal. 186; Hill v. Grigsby, 32 Cal. 58; Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292.

²⁰ Flanagan's Estate v. Great Cen. Land Co., 45 Or. 335, 77 Pac. 485.

²¹ Camden v. Vail, 23 Cal. 633. See, also, Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Remington v. Higgins, 54 Cal. 620; Claiborne v. Castle, 98 Cal. 30, 32 Pac. 807; Samuel v. Allen, 98 Cal. 406, 33 Pac. 273.

²² Russell v. Watt, 41 Miss. 602, 93 Am. Dec. 270. As to when transfer of

contract waives the lien, see Cal. Civ. Code, § 3047.

²³ Dalliba v. Riggs, 7 Idaho, 779, 67 Pac. 430.

²⁴ Ayars v. O'Connor, 45 Wash. 132, 88 Pac. 119.

²⁵ Hunt v. Waterman, 12 Cal. 305.

²⁶ Walker v. Sedgwick, 8 Cal. 398; Flanagan's Estate v. Great Cen. Land Co., 45 Or. 335, 77 Pac. 485. As to sufficiency of complaint to enforce vendor's lien, see Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230, 23 Pac. 292.

§ 6029. **Failure of performance.**—It could not be a defense that only one note was due, as that would be sufficient to show a failure of performance.²⁷

§ 6030. **Jurisdictional defense.**—An action to foreclose a vendor's lien must be commenced in the county in which the land, or some part thereof, is situated. And the superior court of a county in which no part of the property is situated is without jurisdiction of such action, and a demurrer to the complaint upon the ground that the court has no jurisdiction of the subject-matter of the action should be sustained.²⁸

§ 6031. **Defenses of vendee.**—An answer in an action to enforce a vendor's lien which set up a homestead exemption is demurrable when it does not contain such a statement of facts that the court can determine whether the homestead right existed or not.²⁹ Defendant is entitled to have the security afforded by a chattel mortgage exhausted before the vendor's lien upon the land is enforced.³⁰ The defective title of the vendor is no defense in the absence of fraud.³¹ Defendant vendee cannot retain possession and refuse to pay on the ground that the vendor cannot convey a good title to part of the land;³² and the proper action in such case would be one to quiet title against the vendee's claim of ownership.³³

§ 6032. **Rescission—Prior judgment.**—A vendor, after suit and judgment had upon promissory notes given as purchase price of land, may still rescind the contract of sale and retake the land for failure to pay subsequent installments; but such rescission operates to avoid the prior judgment, and may be pleaded by the judgment debtor.³⁴

§ 6033. **Decree.**—The decree requiring defendant to pay a certain amount within ninety days, or have his equitable interest

27 *Creary v. Bowers* (Cal. Sup. Ct. Jan. Term, 1862), not reported.

28 *Urton v. Woolsey*, 87 Cal. 38, 25 Pac. 154; *Southern Pacific R. R. Co. v. Pixley*, 103 Cal. 118, 37 Pac. 194.

29 *Pratt v. Delevan*, 17 Iowa, 307.

30 *Gates v. Green*, 151 Cal. 65, 90 Pac. 189.

31 *O'Sullivan v. Griffith*, 153 Cal. 502, 95 Pac. 873, 96 Pac. 323; *Phenix v. Bijelich* (Nev.), 95 Pac. 351.

32 *Bruschi v. Quail Min. etc. Co.*, 147 Cal. 120, 81 Pac. 404.

33 *Beckman v. Waters*, 3 Cal. App. 734, 86 Pac. 997.

34 *Ward v. Warren*, 44 Or. 102, 74 Pac. 482.

foreclosed, should also require plaintiff to execute a sufficient deed contemporaneously with the payment, or suffer a dismissal of his bill.³⁵ If a sale is ordered to satisfy the lien, no time need be allowed the vendee in which to perform the conditions of the contract.³⁶ If the vendor's deed is placed in escrow, according to agreement, and he then transfers the land to a corporation, subject to the agreement and deed, such corporation may enforce the vendor's lien without putting up a deed from itself; and the decree of foreclosure may require payment of all the price at a time prior to when some of the payments are due.³⁷ The decree may be made for a sale of the land to satisfy the vendor's lien, without a prayer for equitable relief.³⁸

§ 6034. **Ejectment—Unlawful detainer.**—Defendant in ejectment must show that he tendered not only the back installments, but the whole balance of the purchase price of the premises, upon the execution of a deed thereto.³⁹ A vendee having obtained possession of land under an agreement to purchase, failing to comply with his agreement, and the possession of the premises having been duly demanded of him, is guilty of unlawful detainer, and the complaint alleging such facts is sufficient, though it does not allege the agreement to be in writing or that plaintiff is the owner.⁴⁰ If time is not of the essence of the contract, the vendor cannot eject the vendee for failure to pay the balance without showing an abandonment of the contract.⁴¹

FORMS—FORECLOSURE OF VENDOR'S LIEN.

§ 6035. Complaint of vendor against purchaser, to enforce lien.

Form No. 1695.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff sold and conveyed to the defendant . . . acres of land, situated

³⁵ Wollenberg v. Rose, 41 Or. 314, 68 Pac. 804.

³⁶ Gates v. Green, 151 Cal. 65, 90 Pac. 189.

³⁷ Flanagan's Estate v. Great Cen. Land Co., 45 Or. 335, 77 Pac. 485.

³⁸ Gumaer v. Draper, 33 Colo. 122, 79 Pac. 1040.

³⁹ Belger v. Sanchez, 137 Cal. 614, 70 Pac. 738.

⁴⁰ Ruth v. Smith, 29 Colo. 154, 68 Pac. 278.

⁴¹ Brixen v. Jorgensen, 28 Utah, 290, 107 Am. St. Rep. 720, 78 Pac. 674.

in [describe the premises specifically], for the sum of . . . dollars, for which the defendant agreed to pay the plaintiff the sum of . . . dollars. [State terms of sale.]

II. That the defendant is indebted to the plaintiff on account of said sale and conveyance in the sum of . . . dollars, no part of which has been paid.

III. That the plaintiff has a lien as vendor upon said premises for the payment of said purchase money, which he claims in this action.

Wherefore the plaintiff demands judgment:

1. For the said sum of . . . dollars, with interest from the . . . day of . . . , 19..

2. That the said premises may be ordered sold for the payment thereof [etc.]

§ 6036. Complaint of vendor against purchaser and his grantee and judgment creditors, to enforce lien.

Form No. 1696.

[TITLE.]

The plaintiff complains, and alleges:

I. That he was owner in fee of the real property hereinafter described, and on the . . . day of . . . , 19.., he sold the same to the defendant A. B., for the sum of . . . dollars, and thereupon by his deed conveyed the same to the defendant A. B. [in fee], which premises are described as follows: [Description as in deed.]

II. That the said A. B. paid the plaintiff . . . dollars, part of said purchase money, and on the . . . day of . . . , 19.., at . . . , gave to the plaintiff his promissory note for . . . dollars, the residue thereof, payable on the . . . day of . . . , 19..

III. That on the . . . day of . . . , 19.., at . . . , the plaintiff demanded payment of the defendant A. B. [of said note, or] of the residue of said purchase money, but he did not pay the same.

IV. That the said C. D. purchased of the said A. B. a portion of said premises, with the full knowledge that the said A. B. had not paid the balance of said purchase money, and took a conveyance from the said A. B. to him for the said premises so by him purchased of the said A. B.

V. That the said E. F. claims to have recovered judgment against the said A. B. for . . . dollars, on the . . . day of . . . , 19.., in the . . . court, in the . . . county, state of . . . , and

has caused execution to be issued thereon, and is proceeding to sell the part of said premises not sold to the said C. D., whereby the said plaintiff will wholly lose the balance of the said purchase money, as the said A. B. is wholly insolvent and unable to pay the same.

Wherefore the plaintiff demands judgment:

1. Against the said A. B. for the said sum of . . . dollars, together with interest thereon from the . . . day of . . . , 19.., and the costs of this action.

2. That in case the said A. B. shall not pay the said judgment, that the said premises may be sold, and so much of the proceeds as may be necessary be applied to the payment of the judgment so to be rendered.

CHAPTER CXLI.

FORECLOSURE OF MECHANIC'S AND MATERIALMAN'S LIENS.

§ 6037. **In general.**—A lien is a charge imposed upon specific property, by which it is made security for the performance of an act.¹ A person claiming the benefits of the mechanic's lien statute must bring himself clearly within its provisions.² The lien cannot be enforced for anything other than the thing for which it was given.³ Liens against two or more buildings may be included in one claim, but the amount due on each must be designated.⁴

§ 6038. **Alteration in building.**—Changing the form or structure of a building, or its alteration to adapt it to other than its original uses, brings it within the statute.⁵

§ 6039. **Credits and offsets.**—The words "payments and offsets" are substantially equivalent to the words "credits and offsets."⁶

§ 6040. **Complaint by subcontractor.**—In New York, where the proceeding is by a subcontractor, his complaint must aver that the labor or materials were furnished in conformity with the contract between the owner and the original contractor.⁷ The complaint must show that the claimant has taken the requisite steps to create a lien.⁸ A superintendent employed by the contractor is not entitled to a lien for services rendered in traveling about and

¹ Cal. Code Civ. Proc., § 1180.

² Pitschke v. Pope, 20 Colo. App. 328, 78 Pac. 1077; Volker v. Vance, 32 Utah, 74, 125 Am. St. Rep. 828, 88 Pac. 896.

³ Frowenfeld v. Hastings, 134 Cal. 128, 66 Pac. 178.

⁴ Eccles Lumber Co. v. Martin, 31 Utah, 241, 87 Pac. 713.

⁵ Donahue v. Cromartie, 21 Cal. 86.

⁶ Preston v. Sonora Lodge, 39 Cal. 119.

⁷ Broderick v. Poillon, 2 E. D. Smith, 554; Quinn v. Mayor etc. of

New York, 2 E. D. Smith, 558. See, also, Cunningham v. Jones, 4 Abb. Pr. 433; Doughty v. Devlin, 1 E. D. Smith, 625; Kennedy v. Paine, 1 E. D. Smith, 651; Cronk v. Whittaker, 1 E. D. Smith, 647; Hauptman v. Halsey, 1 E. D. Smith, 668. Compare Ricker v. Shadt, 5 Tex. Civ. App. 460, 23 S. W. 907; Teahen v. Nelson, 6 Utah, 363, 23 Pac. 764; Ditto v. Jackson, 3 Colo. App. 281, 33 Pac. 81.

⁸ Foster v. Poillon, 2 E. D. Smith, 556; Conkright v. Thompson, 1 E. D. Smith, 661.

urging dealers to hasten the delivery of materials purchased for the job.⁹

§ 6041. **Construction of averment.**—The reasonable construction of an allegation in a complaint, that “plaintiff furnished the material between the sixth day of April, 1862, and the twenty-eighth day of June, 1862,” is that the plaintiff commenced furnishing the materials on the sixth day of April, and continued furnishing the same from time to time up to June 28th.¹⁰ The omission to allege in the complaint the time when the building was commenced is cured by the allegation that the lien of the defendants accrued subsequently to the lien of the plaintiff. This allegation, if denied, presents an issue under which all evidence as to the time when the building was commenced would be admissible.¹¹

§ 6042. **Description of premises.**—A complaint is sufficient if it describes the premises sufficiently to enable the sheriff to determine beyond a doubt the premises to be sold; and the street number of the premises should be shown, or the plaintiff’s ignorance of it averred.¹² The employees of the contractor have no lien on the building as principals.¹³ The following notice of a mechanic’s lien does not contain such a description of the premises as the statute contemplates: “A dwelling-house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. . . .” The fact that Conner owned no other building on that street would not cure the defect.¹⁴

The legislature of 1907 attempted to remove the technicality usually enforced by making the lien valid in spite of such mistakes and errors, unless the court finds that such errors were

⁹ *Pitschke v. Pope*, 20 Colo. App. 328, 78 Pac. 1077.

¹⁰ *McCrea v. Craig*, 23 Cal. 522.

¹¹ *Rust-Owen Lumber Co. v. Fitch*, 3 S. Dak. 213, 52 N. W. 879. As to allegation of date of completion of building, see *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643.

¹² For description of real property in complaint, see Cal. Code Civ. Proc., § 455; *Duffy v. McManus*, 3 E. D. Smith, 657, 4 Abb. Pr. 432.

¹³ *Dore v. Sellers*, 27 Cal. 588.

¹⁴ *Montrose v. Conner*, 8 Cal. 344. But see *Springer v. Keyser*, 6 Whart. (Pa.) 187; *Harker v. Conrad*, 12 Serg. & R. (Pa.) 301, 14 Am. Dec. 691; *Tibbetts v. Moore*, 23 Cal. 212. For insufficient description, see *Hendy v. Pacific Cable Co.*, 24 Or. 152, 33 Pac. 403. For sufficient description, see *Willamette S. M. Co. v. Kremer*, 94 Cal. 205, 29 Pac. 633; *Whiteside v. Lebecher*, 7 Mont. 473, 17 Pac. 548; *Lignoski v. Crooker* (Tex. Civ. App.) 22 S. W. 774.

made with intent to defraud, or that an innocent third party, without notice, became the *bona fide* owner of the property, and the notice was so defective as not to put the party upon further inquiry.¹⁵ The description in the complaint may be made by reference to the claim of lien, and in the decree by describing the house, ordering a sale of the house and the land on which it stands.¹⁶ A case cannot be reversed because the decree does not show how much land is necessary for the building's occupation.¹⁷

§ 6043. **Interest of third parties.**—The rights and interest of third parties, purchasers and incumbrancers, prior to the suit, are affected only in a similar degree as upon a foreclosure of a mortgage.¹⁸ A purchaser of the property at foreclosure sale is the real party defendant.¹⁹

§ 6044. **Ownership—Interest in the premises.**—Where a complaint to enforce a mechanic's lien alleges that at the time the materials were furnished a certain party was the owner and reputed owner of the land, and seeks to subject the interest of such owner to the lien, but the lien notice, upon which the action is founded, alleges that the materials were furnished at the instance and request of another party, the interest of the latter not being described, the complaint does not state a cause of action against either.²⁰ The ownership required may be of only a leasehold interest. The lien is then subject to the legal title.²¹ Under the laws of South Dakota, an averment in the complaint as against persons made defendants, other than the owner of the premises sought to be charged with the lien, that they have, or claim to have, some interest in or lien upon the premises, which lien or interest, if any, accrued subsequently to the lien of the plaintiff, is sufficient; and if such defendants have any interest in or lien upon the premises, they must set it out if they desire to defend the action.²² A complaint to foreclose a mechanic's lien which

15 Cal. Code Civ. Proc., § 1203a.

16 Newell v. Brill, 2 Cal. App. 61, 83 Pac. 76.

17 Sidlinger v. Kerkow, 82 Cal. 45, 22 Pac. 932; Sachse v. Auburn, 95 Cal. 651, 30 Pac. 800.

18 Whitney v. Higgins, 10 Cal. 547. 70 Am. Dec. 748. But see Cal. Code Civ. Proc., § 1186.

19 McEwen v. Union Bank etc. Co., 35 Mont. 470, 90 Pac. 359.

20 Cutter v. Striegel, 4 Wash. 346, 30 Pac. 326.

21 Crutcher v. Block, 19 Okla. 246, 91 Pac. 895; Owen v. Casey, 48 Wash. 673, 94 Pac. 473.

22 Rust-Owen Lumber Co. v. Fitch, 3 S. Dak. 213, 52 N. W. 879.

makes the assignee of the estate of the person to whom the materials were furnished a party, and, without describing him as assignee, merely alleges that he has some interest in the premises, must be interpreted as directed against such party's interest in his personal capacity, and not as assignees.²³

§ 6045. Jurisdiction.—The proceeding to enforce a mechanic's lien under the California law of 1861 was a special case, and county courts had jurisdiction;²⁴ but under the Code of Civil Procedure, superior courts now have exclusive jurisdiction. In New Mexico, there is concurrent jurisdiction in law and equity on the subject of the enforcement of liens.²⁵ The proceeding to enforce a mechanic's lien must be taken upon the equity side of the court.²⁶ The proceeding is equitable in its nature.²⁷

The court has no jurisdiction to foreclose on community property as to the wife, unless she is made a party and served with proper notice within the statutory period.²⁸ Jurisdiction is not affected by the ownership of fee title being in the government, when no attempt is made to foreclose upon that title.²⁹

§ 6046. Notice of lien—Allegations.—It must affirmatively appear from the complaint, in a suit to foreclose a mechanic's or laborer's lien, that the notice filed contained all the essential provisions required by statute.³⁰ The fact that a contract as to one item is improperly set out in the notice will not render it void as to the other items.³¹ The plaintiff must in his complaint allege everything essential to the existence and establishment of his claim, and by allegations, both specific and general, bring himself literally within the terms of the statute.³² A bill to enforce a

²³ *Quinby v. Slipper*, 7 Wash. 475, 38 Am. St. Rep. 899, 35 Pac. 116.

²⁴ *McNiel v. Borland*, 23 Cal. 144.

²⁵ *Hobbs v. Spiegelberg*, 3 N. Mex. 222 (357), 5 Pac. 529.

²⁶ *Finane v. Las Vegas etc. Imp. Co.*, 3 N. Mex. 256 (411), 5 Pac. 725; *Straus v. Finane*, 3 N. Mex. 260 (398), 5 Pac. 729; *Rupe v. New Mexico Lumber Assoc.*, 3 N. Mex. 261 (393), 5 Pac. 730.

²⁷ *Williams v. Uncompahgre Canal Co.*, 13 Colo. 469, 22 Pac. 806.

²⁸ *Northwest Bridge Co. v. Tacoma*

Shipbuilding Co., 36 Wash. 333, 78 Pac. 996.

²⁹ *Jarrell v. Block*, 19 Okla. 467, 92 Pac. 167.

³⁰ *Pilz v. Killingsworth*, 20 Or. 432, 26 Pac. 305; *Wagner v. Hansen*, 103 Cal. 104, 37 Pac. 195; *Texas etc. R. R. Co. v. Orman*, 3 N. Mex. 365 (652), 9 Pac. 595.

³¹ *Linck v. Johnson*, 134 Cal. xix, 66 Pac. 674.

³² *Arkansas River etc. Canal Co. v. Flinn*, 3 Colo. App. 381, 33 Pac. 1006; *Mouat Lumber Co. v. Freeman*,

mechanic's lien on railroad property, referring to the notices filed, as prescribed by statute, and setting out in detail the work and labor performed and materials furnished, is sufficient, though it does not specifically set out the particular items stated in the notice.³³ Section 1187 of the Code of Civil Procedure of California requires the claimant of a mechanic's lien to state the name of the owner or reputed owner, if known, of the property to be charged with the lien; but if the names are not known, the claim filed is sufficient under the statute if it is silent upon the subject. And a complaint to foreclose a mechanic's lien sufficiently avers notice to the owner of land of the construction of the building if it alleges that the building was constructed upon said land with the knowledge of each of said defendants, the owner of the land being one of the defendants.³⁴

No mistakes or errors in the statement of the demand, or of the amount of credits and offsets allowed, or of the balance claimed, or in the description of the property, shall invalidate the lien, unless the court finds it was made to defraud, or that an innocent third party, without notice sufficient to put him on further inquiry, has purchased the land subsequent.³⁵

§ 6047. **Labor.**—Services rendered in cooking for the men employed in constructing a building are not performed on the building, and are not within the provisions of the statute;³⁶ nor are the services of a superintendent in going about urging dealers to hasten the delivery of materials bought for the job.³⁷ Labor performed or materials furnished for other purposes than those specified in the lien act cannot be made the foundation of a lien.³⁸ But cartage, which is a portion of the cost of materials furnished for the construction of a building, may be properly allowed as part of

7 Colo. App. 152, 42 Pac. 1040; *Curtis v. Sestanovich*, 26 Or. 107, 37 Pac. 67; *Cook v. Rome Brick Co.*, 98 Ala. 409, 12 South. 918. As to sufficient notice of lien, see *Allen v. Rowe*, 19 Or. 188, 23 Pac. 901. As to insufficient notice of lien, see *Anderson v. Bingham*, 1 Colo. App. 222, 28 Pac. 145.

³³ *Texas etc. R. R. Co. v. Orman*, 3 N. Mex. 365 (652), 9 Pac. 595.

³⁴ *West Coast Lumber Co. v. Newkirk*, 80 Cal. 275, 22 Pac. 231. See

Corbett v. Chambers, 109 Cal. 178, 41 Pac. 873; *Reed v. Norton*, 90 Cal. 596, 26 Pac. 767, 27 Pac. 426; *Leiegne v. Schwarzler*, 67 How. Pr. 130.

³⁵ Cal. Code Civ. Proc., § 1203a.

³⁶ *McCormick v. Los Angeles W. Co.*, 40 Cal. 187.

³⁷ *Pitschke v. Pope*, 20 Colo. App. 328, 78 Pac. 1077.

³⁸ *Arkansas River etc. Canal Co. v. Nelson*, 4 Colo. App. 438, 36 Pac. 307.

the value of the materials furnished, upon foreclosure of a mechanic's lien therefor.³⁹

§ 6048. **Limitations.**—The lien must be enforced within ninety days after completion of the work, or after the expiration of credit extended.⁴⁰ If the last payment is to be made thirty-five days after completion of the work, the time extends for ninety days after the thirty-five days.⁴¹ In Washington, action must be brought within eight months after filing the lien, by complaint duly filed within that time.⁴²

If the time has expired for the enforcement of the lien, the plaintiff is not entitled to a judgment;⁴³ and a notice filed before the completion of the building is premature and of no effect.⁴⁴

§ 6049. **Lien—Nature of.**—A mechanic's lien is in the nature of a mortgage, is a charge on the land, and a mere incident to the debt, and will not pass except by an assignment of the debt.⁴⁵ The rule that the assignment of a debt carries with it the lien by which it is secured, if applicable at all to a mechanic's lien, does not apply where at the time of the assignment of the debt of a laborer or materialman the assignor had merely a personal right to create a lien by complying with the statute.⁴⁶

§ 6050. **Materialman.**—In a suit by a materialman to enforce a lien against a building for lumber sold to the contractor, it must be averred and proved that the lumber was expressly furnished for the building in question, and it is not sufficient to show that it was used in such building.⁴⁷ So a materialman is only entitled to be paid from that portion of the contract price which remains due and unpaid to the contractor by the owner when the material-

³⁹ West Coast Lumber Co. v. Newkirk, 80 Cal. 275, 22 Pac. 231. As to extent of lien, see Tunis v. Lakeport etc. Park Assoc., 98 Cal. 285, 33 Pac. 63.

⁴⁰ Cal. Code Civ. Proc., § 1190.

⁴¹ Hughes Bros. v. Hoover, 3 Cal. App. 145, 84 Pac. 681.

⁴² Wash. Bal. Codes, § 5908; Service v. McMahon, 42 Wash. 452, 85 Pac. 33.

⁴³ Green v. Jackson Water Co., 10

Cal. 374. See Cal. Code Civ. Proc., § 1190.

⁴⁴ Tabor-Pierce Lumber Co. v. International Trust Co., 19 Colo. App. 108, 75 Pac. 150.

⁴⁵ Ritter v. Stevenson, 7 Cal. 389. See Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

⁴⁶ Mills v. La Verne Land Co., 97 Cal. 254, 33 Am. St. Rep. 168, 32 Pac. 169.

⁴⁷ Bottomly v. Rector etc. Grace Church, 2 Cal. 90.

man files his lien.⁴⁸ And where the complaint fails to allege that anything is due from the owner to the original contractor when the plaintiff's lien was filed, it does not contain a statement of a cause of action.⁴⁹

§ 6051. **Materials.**—Liens for materials and for labor are on the same footing.⁵⁰ The complaint must show not only that the materials were used in the construction of the building, but that they were furnished under an express contract for that particular building on which the lien is claimed;⁵¹ and materials temporarily used in construction and then removed are not materials protected by the lien law.⁵² And, further than that, the materialman must have known the materials were to be used in some particular building, so that he relied upon the credit of such property, or he is not entitled to the lien.⁵³ Materials are furnished when they are delivered, or are ready for delivery, at the place agreed upon by the contract.⁵⁴ One who loans money to pay for material and labor has no lien.⁵⁵ Materials furnished are exempt from execution or attachment except for the purchase money.⁵⁶ An allegation in the complaint and a finding as to the value of labor done and materials furnished to a contractor for the erection of a building under void unrecorded contracts are essential to support a judgment of foreclosure of a lien therefor, and it is not sufficient to allege merely what amounts the contractor agreed to pay for the labor and materials furnished for each building.⁵⁷

§ 6052. **Name of person.**—The name of the person by whom the claimant was employed, or to whom he furnished the material, must be stated.⁵⁸

⁴⁸ *Rosekranz v. Wagner*, 62 Cal. 154.

⁴⁹ *Turner v. Strenzel*, 70 Cal. 28, 11 Pac. 389. See *Russ Lumber etc. Co. v. Garrettson*, 87 Cal. 589, 25 Pac. 747.

⁵⁰ *Moxley v. Shepard*, 3 Cal. 64.

⁵¹ *Bottomly v. Rector etc. Grace Church*, 2 Cal. 91; *Houghton v. Blake*, 5 Cal. 240; *Holmes v. Rickett*, 56 Cal. 310, 38 Am. Rep. 54; *Patent Brick Co. v. Moore*, 75 Cal. 205, 16 Pac. 890; *Cohn v. Wright*, 89 Cal. 86, 26 Pac. 643.

⁵² *Stimson Mill Co. v. Los Angeles*

Traction Co., 141 Cal. 30, 74 Pac. 357.

⁵³ *Tabor-Pierce Lumber Co. v. International Trust Co.*, 19 Colo. App. 108, 75 Pac. 150.

⁵⁴ *Tibbetts v. Moore*, 23 Cal. 214.

⁵⁵ *Godeffroy v. Caldwell*, 2 Cal. 491, 56 Am. Dec. 360.

⁵⁶ Cal. Code Civ. Proc., § 1196.

⁵⁷ *Booth v. Pendola*, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101.

⁵⁸ Cal. Code Civ. Proc., § 1187; *Wood v. Wrede*, 46 Cal. 637; *Malone v. Big Flat etc. Min. Co.*, 76 Cal. 578, 18 Pac. 772.

§ 6053. **Notice of terms of contract.**—If subcontractors, materialmen, or laborers furnish material or labor in the construction of a building or work, relying upon their right of lien under the statutes as security for their pay, they must be held to know the terms to which the right is subordinate, and upon which a lien can be secured, and to a strict compliance with these terms.⁵⁹ All such persons are presumed to have notice of the contract, a knowledge of its terms, and of the rights and obligations of the parties thereto.⁶⁰ One is not entitled to a lien for materials furnished by another party, the owner not having been informed of such fact.⁶¹ A complaint in an action to enforce a mechanic's lien, which proceeds upon the theory that there was no valid written contract for the erection of the building, but that the plaintiffs dealt directly with the owner of the building, and that he is liable for the whole of their claims, will not warrant a judgment based upon findings that there was such a contract, and that the plaintiffs dealt directly with the contractor and not with the owner.⁶²

§ 6054. **Complaint—Requisites of—In general.**—To entitle the plaintiff to judgment foreclosing a mechanic's lien, all the material facts which entitle him to such relief must be stated in the complaint, and when an allegation essential to a recovery is absolutely wanting, an appellate court will not permit a judgment by default to stand.⁶³ But no allegation need be inserted in a complaint for the foreclosure of a mechanic's lien relative to the claim of the plaintiff for attorney's fees. An allegation on that subject, if made, does not bind the party making it, and an issue made by the pleadings on that question is immaterial, and the court need not find upon it.⁶⁴ The contract stated in the notice of lien must be the same in all essentials as the contract stated in the complaint; and the variance is fatal if the complaint is on a *quantum meruit*, and the contract stated in the notice is for a fixed price.⁶⁵ The complaint on foreclosure cannot cover lots not included in the

⁵⁹ Henley v. Wadsworth, 38 Cal. 356.

⁶⁰ Id.

⁶¹ Sickman v. Wollett, 31 Colo. 58, 71 Pac. 1107.

⁶² Reed v. Norton, 99 Cal. 617, 34 Pac. 333. Compare Hineckley v. Field's Biscuit etc. Co., 91 Cal. 136, 27 Pac. 594.

⁶³ Arkansas River etc. Canal Co. v. Nelson, 4 Colo. App. 438, 36 Pac. 307.

⁶⁴ Clancy v. Plover, 107 Cal. 272, 40 Pac. 394. See Pacific Mut. Life Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

⁶⁵ Malone v. Big Flat etc. Min. Co., 76 Cal. 578, 18 Pac. 772.

notice of lien.⁶⁶ Where the complaint alleged, and the claim of lien stated, that the work was done under a contract by which the claimant was employed to do the work at an agreed price, but the evidence of the plaintiff showed that, except as to one small item, there was no agreed price for any of the work, the variance was held fatal.⁶⁷ The contents of the claim of lien may be pleaded by attaching a copy thereof to the complaint and making it a part thereof by apt reference.⁶⁸ Where several mechanics' liens are united in one complaint, and there is a distinct statement of the facts as to each lien, there is a sufficient separate statement of each cause of action, though they are not numbered or otherwise formally designated.⁶⁹

§ 6055. Miner's lien—Averment of non-payment.—In an action to foreclose a miner's lien, an allegation that the defendant, for whom the plaintiff performed the services for which the lien was filed, has paid to the plaintiff no part of the amount due therefor, and that the same is now due and owing to the plaintiff from the defendant, is a sufficient averment of non-payment, in the absence of a demurrer.⁷⁰

§ 6056. Complaint—Change of cause of action.—A complaint in an action by a contractor to enforce a mechanic's lien, in which the special contract between the contractor and owner of the building is stated, can be changed by amendment into an action on the contract, which may be counted on specially, or the common counts in *assumpsit* may be used, in accordance with the general rules applicable to such counts.⁷¹ Where a contract expressly apportions the price to each item, or embraces several undertakings with distinct considerations, it is severable, and proof of the whole is not a fatal variance from a claim of part thereof.⁷²

§ 6057. Complaint—Foreclosure of seed lien.—Under the statute of North Dakota^{72a} authorizing a seed lien, the "account

⁶⁶ Perkins v. Boyd, 37 Colo. 265, 86 Pac. 1045.

⁶⁷ Wagner v. Hansen, 103 Cal. 104, 37 Pac. 195.

⁶⁸ Russ Lumber etc. Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747.

⁶⁹ Booth v. Pendola, 88 Cal. 36, 23 Pac. 200, 25 Pac. 1101. See Green v. Clifford, 94 Cal. 49, 29 Pac. 331;

Malone v. Big Flat etc. Min. Co., 76 Cal. 578, 18 Pac. 772.

⁷⁰ Palmer v. Uncas Mining Co., 70 Cal. 614, 11 Pac. 666.

⁷¹ Castagnino v. Balletta, 82 Cal. 250, 23 Pac. 127.

⁷² Rockwell v. Light, 6 Cal. App. 563, 92 Pac. 649.

^{72a} Comp. Laws, § 5490.

in writing'' must embrace a description of the land on which the seed has been or is to be planted. And where in an action to foreclose such lien the complaint shows affirmatively that the land is not described in the account in writing which was filed, such complaint fails to state a cause of action so far as the lien is concerned.⁷³

§ 6058. **Complaint—Foreclosure of logger's lien.**—In an action to enforce a logger's lien, under the California statute,^{73a} the complaint must allege that something was due from the defendant to the original contractor when the lien of the plaintiff was filed, or that the defendant was notified or had knowledge of the claim of the plaintiff prior to the payment in full of the amount due to the original contractor under the contract.⁷⁴

§ 6059. **Parties intervening.**—Persons having a lien by mortgage upon the property have no right to intervene.⁷⁵ An intervention within six months is as much a compliance with the act as the original suit.⁷⁶ But where the suit has been pending for some time, and the application to intervene was made just as plaintiff was taking judgment, it is properly refused.⁷⁷

§ 6060. **Foreclosure of liens—Parties.**—In an action to foreclose a lien upon a structure in favor of a laborer or materialman it is proper to make both the owner and the original contractor parties defendant, and to unite a personal action against the contractor with the foreclosure suit against the owner, in order to prevent multiplicity of suits.⁷⁸ In foreclosing a lien upon community property the wife of the owner should be made a party and served within statutory time, or her interest will not be affected.⁷⁹ All persons claiming liens should be made parties, and the contractor is a necessary party to a full and complete determination of the matters in controversy.⁸⁰ The contractors being

⁷³ Lavin v. Bradley, 1 N. Dak. 291, 47 N. W. 384.

^{73a} Act of March 30, 1878, as amended by act of April 12, 1880. See Cal. Civ. Code, § 3065.

⁷⁴ Wilson v. Barnard, 67 Cal. 422, 7 Pac. 845. As to foreclosure of farm-laborers' liens, see Pain v. Isaacs, 10 Wash. 173, 38 Pac. 1038.

⁷⁵ Van Winkle v. Stow, 23 Cal. 457.

⁷⁶ Mars v. McKay, 14 Cal. 127.

⁷⁷ Hooker v. Kelley, 14 Cal. 164.

⁷⁸ Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419.

⁷⁹ Northwest Bridge Co. v. Tacoma Shipbuilding Co., 36 Wash. 333, 78 Pac. 996; Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744.

⁸⁰ Giant Powder Co. v. San Diego Flume Co., 78 Cal. 193, 20 Pac. 419.

partners, only one of them need be made a defendant, unless the property-owner desires it, when the court may have the others brought in, if they are within its jurisdiction.⁸¹ Those having filed lien claims prior to the time of filing a foreclosure suit must be made parties, either plaintiff or defendant; and those filing subsequently must make application in order to be made parties.⁸² A complaint in such action which makes the assignee of the estate of the person to whom the materials were furnished a party, and, without describing him as assignee, merely alleges that he has some interest in the premises, must be interpreted as directed against such party's interest in his personal capacity, and not as assignee.⁸³

§ 6061. **Complaint.**—The fact that the complaint alleges that the building and structure was completed “on or about” a certain date does not subject the complaint to a general demurrer for insufficiency where the complaint alleges that the claim of lien was filed within thirty days after the completion of said building and structure.⁸⁴ An action to foreclose a mechanic's lien being one triable in equity under the Washington procedure, it is within the discretion of the court to grant or refuse a jury trial as to any question of fact involved in actions consolidated for purposes of trial with the action of foreclosure.⁸⁵ A complaint in an action to foreclose an alleged lien for personal property taxes, arising under the North Dakota statute,^{85a} which fails to allege that the tax claimed to be a lien was ever assessed or levied, and contains no averment that the treasurer of the county in question ever received the tax-books in the years in question, is insufficient. In such actions the general presumption that public officers have done their duty will not supply the place of material averments of fact which are omitted from the complaint.⁸⁶

81 *Barnes v. Colorado Springs etc. Ry. Co.*, 42 Colo. 461, 94 Pac. 570.

82 *Wash. Bal. Codes*, § 5910; *Lavanway v. Cannon*, 37 Wash. 593, 79 Pac. 1117.

83 *Quinby v. Slipper*, 7 Wash. 475, 38 Am. St. Rep. 899, 35 Pac. 116.

84 *Wood v. Oakland etc. Transit Co.*, 107 Cal. 500, 40 Pac. 806. As to

complaint for foreclosure of mechanic's lien against railroad company, see *Helena Lumber Co. v. Montana etc. R. R. Co.*, 10 Mont. 81, 24 Pac. 702.

85 *Wheeler v. Ralph*, 4 Wash. 617, 30 Pac. 709.

85a *Laws 1890*, ch. 132, § 90.

86 *Swenson v. Greenland*, 4 N. Dak. 532, 62 N. W. 603.

§ 6062. **Complaint—Continued.**—The complaint should set out defendant's interest in the land, in enforcing a lien for construction of a well, and that the lien was filed within thirty days after completion of the work.⁸⁷ The complaint need not follow the description given in the notice.⁸⁸ The property may be described in the complaint by reference to the description in the claim of lien.⁸⁹ Alleging that defendant ordered certain extra work at an agreed price sufficiently alleges defendant's liability.⁹⁰ It should appear that defendant has money due the contractor, or that he has made premature payments, in order to hold the owner;⁹¹ and this rule applies where the contractor has abandoned the work.⁹² It is not necessary to allege that the land sought to be subjected to the lien is necessary for the convenient use and occupation of the building.⁹³ A motion for a bill of particulars will be denied if the complaint itself is sufficiently particular.⁹⁴ The complaint is good as against a general demurrer if it states a cause of action for either the enforcement of a lien or a general recovery.⁹⁵

§ 6063. **Joinder of parties and claims.**—Any number of claimants may join in the same action, or the court may consolidate them if commenced separately.⁹⁶ Materialmen and mechanics entitled to a lien on a building, but whose claims are several, without any community of interest in the claims themselves, may join as plaintiffs in an equitable action to establish and enforce their liens.⁹⁷ Liens against two or more buildings may be included in one claim, the amount on each being designated.⁹⁸

§ 6064. **Personal actions.**—Nothing in the provisions of the code giving a lien impairs or affects the right of any person to

⁸⁷ Cal. Code Civ. Proc., § 1185; Parke & Lacey Co. v. Inter Nos Oil etc. Co., 147 Cal. 490, 82 Pac. 51.

⁸⁸ Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081.

⁸⁹ Newell v. Brill, 2 Cal. App. 61, 83 Pac. 76.

⁹⁰ Id.

⁹¹ Nason v. John, 1 Cal. App. 538, 82 Pac. 566; Los Angeles Pressed Brick Co. v. Los Angeles-Pacific Boulevard etc. Co., 2 Cal. App. 303, 83 Pac. 292.

⁹² McCue v. Jackman, 7 Cal. App. 703, 95 Pac. 673.

⁹³ Seely v. Neill, 37 Colo. 198, 86 Pac. 334.

⁹⁴ Nelson-Bennett Co. v. Twin Falls Land etc. Co., 14 Idaho, 5, 93 Pac. 789.

⁹⁵ Lee v. Kimball, 45 Wash. 656, 88 Pac. 1121.

⁹⁶ Cal. Code Civ. Proc., § 1195.

⁹⁷ Barber v. Reynolds, 33 Cal. 497. See, also, Cal. Code Civ. Proc., § 1195.

⁹⁸ Eccles Lumber Co. v. Martin, 31 Utah, 241, 87 Pac. 713.

maintain a personal action to recover the debt secured.⁹⁹ A personal judgment cannot be entered against the landowner, the claim being enforceable only against the land.¹⁰⁰

§ 6065. **Priority of liens.**—Where different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens, which shall be—1. All persons performing manual labor in, on, or about the same; 2. Persons furnishing materials; 3. Subcontractors; 4. Original contractors. The proceeds of sale must be applied in the same order, and a judgment for any deficiency may be docketed as in case of the foreclosure of a mortgage.¹⁰¹ A mechanic's lien is preferred to a mortgage made after the commencement of the work.¹⁰² The lien accrues at the commencement of the work or the beginning to furnish the materials.¹⁰³ The lien of a judgment, rendered after labor is commenced or material is first delivered, is postponed to the lien of the materialman or laborer, although the labor is completed and the last of the material delivered after the judgment is docketed.¹⁰⁴

§ 6066. **Assignees.**—The assignee of a laborer's claim can recover only by alleging and proving a specific sum due his assignor by reason of labor performed under a contract, and that by virtue of the assignment he succeeded to it.¹⁰⁵ And the assignee cannot enforce a lien which the assignor had waived.¹⁰⁶

§ 6067. **Several claims.**—Some statutes provide that one claim may be filed against two or more separate pieces of property owned by the same person, or by two or more separate persons who jointly contracted for the labor or material.¹⁰⁷ And a lien claim filed against several houses for labor and material furnished under an entire contract is sufficient as against another lienor who levies upon one of those houses, to the extent of the amount claimed

⁹⁹ Cal. Code Civ. Proc., § 1197.

¹⁰⁰ Builders' Supply Depot v. O'Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909.

¹⁰¹ Cal. Code Civ. Proc., § 1194.

¹⁰² Crowell v. Gilmore, 13 Cal. 56; Soule v. Dawes, 7 Cal. 576.

¹⁰³ McCrea v. Craig, 23 Cal. 525.

¹⁰⁴ Barber v. Reynolds, 44 Cal. 520; Cal. Code Civ. Proc., § 1186.

¹⁰⁵ Hanna v. Savings Bank, 3 Colo. App. 28, 31 Pac. 1020.

¹⁰⁶ Kent Lumber Co. v. Ward, 37 Wash. 60, 79 Pac. 485.

¹⁰⁷ Wash. Bal. Codes, § 5907; Cal. Code Civ. Proc., § 1188.

against that particular house; provided however, that the lien claim and cross-complaint both set out the amount claimed against each house.¹⁰⁸ Where different liens are asserted against the same property, the court must declare the rank of each lien, as follows: 1. Manual labor; 2. Persons furnishing materials; 3. Subcontractors; 4. Original contractors; and they must be paid off in said order.¹⁰⁹

§ 6068. **Mortgage versus mechanic's lien.**—A recorded mortgage stands prior to any lien for labor performed upon the mortgaged premises, and this even though the mortgagee be manager of the corporation mortgagor and direct the labor performed.¹¹⁰

§ 6069. **Right of lien.**—Unless some one or some portion of the several payments to be made to the contractor during the progress of the building were made to the original contractor by the employer before they became due by the terms of the original contract, or after notice had been duly served upon the employer by the holder of a claim against the contractor, the claimant has no right of lien upon the premises, and no legal personal claim against the employer.¹¹¹ If the owner of a building which is being erected makes payments to the contractor in good faith before receiving notice that a materialman claims a lien for material furnished the contractor, such materialman cannot enforce his lien except for the balance, if any, due the contractor on the contract.¹¹² The amendments to the Code of Civil Procedure concerning liens of mechanics and materialmen, adopted in 1874, have not changed the above rule.¹¹³

§ 6070. **Relative rights of parties.**—Upon a compliance on their part with the terms of a statute, the right of a subcontractor, laborer, or materialman to the lien, which through the original contractor inures primarily to the benefit of persons in that relation, must be determined and controlled by the terms of the original contract between the owner and original contractor.¹¹⁴

¹⁰⁸ Powell v. Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹⁰⁹ Cal. Code Civ. Proc., § 1194.

¹¹⁰ Middleton v. Arastraville Min. Co., 146 Cal. 219, 79 Pac. 889.

¹¹¹ Henley v. Wadsworth, 38 Cal. 360.

¹¹² Wells v. Cahn, 51 Cal. 423.

¹¹³ Id.

¹¹⁴ Henley v. Wadsworth, 38 Cal. 356; citing Shaver v. Stilwell, 36 Cal. 293. See Davis v. John Mouat Lumber Co., 2 Colo. App. 381, 31 Pac. 187; Ditto v. Jackson, 3 Colo. App.

§ 6071. **Statement of demand.**—It has been held unnecessary to set out the items of the account.¹¹⁵ A statement will not be rejected because it was filed for too much, unless it appears that it was a willfully false claim.¹¹⁶ The statute must be strictly pursued;¹¹⁷ but a mere mistake in a word will not vitiate a claim.¹¹⁸

§ 6072. **Verification.**—If the claimant signs the verification, he need not sign the claim.¹¹⁹ The agent and manager of the claimant may properly verify the claim.¹²⁰ In Montana, a verification made by the president of a corporation claimant upon information and belief is insufficient.¹²¹ In Colorado, the verification may be made on information and belief.¹²²

§ 6073. **Subsequent statute governs.**—Where the contract was made and the materials furnished while the California lien law of 1858 was in force, but notice of lien was not filed until after the lien law of 1862 went into effect, the lien must be enforced according to the provisions of the latter act.¹²³

§ 6074. **Amending lien notice.**—A claim of lien may be amended in an action to foreclose the same, by order of the court;¹²⁴ but a new lien notice filed after the time for filing has expired has no force.¹²⁵ The court may allow the proper name of the owner and a corrected description of the property to be inserted in the claim and foreclosure thereon.¹²⁶

§ 6075. **Defenses.**—A formal objection to a mechanic's claim should be raised by demurrer, or by motion to strike it off. The

281, 33 Pac. 81. The doctrine of the text is also maintained in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Am. St. Rep. 691, 19 Atl. 632, 7 L. R. A. 711.

¹¹⁵ *Brennan v. Swasey*, 16 Cal. 140, 76 Am. Dec. 507; *Selden v. Meeks*, 17 Cal. 131.

¹¹⁶ *Barber v. Reynolds*, 44 Cal. 520.

¹¹⁷ *Wood v. Wrede*, 46 Cal. 638. Compare *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

¹¹⁸ *McDonald v. Backus*, 45 Cal. 262.

¹¹⁹ *Hicks v. Murray*, 43 Cal. 521. See *Corbett v. Chambers*, 109 Cal. 178, 41 Pac. 873.

¹²⁰ *Parke & Lacey Co. v. Inter Nos Oil Co.*, 147 Cal. 490, 82 Pac. 51; *Cal. Code Civ. Proc.*, § 1187.

¹²¹ *Western Plumbing Co. v. Fried*, 33 Mont. 7, 114 Am. St. Rep. 799, 81 Pac. 394; *Mont. Rev. Codes*, § 7291.

¹²² *Gutshall v. Kornaley*, 38 Colo. 195, 88 Pac. 158.

¹²³ *McCrea v. Craig*, 23 Cal. 522.

¹²⁴ *Wash. Bal. Codes*, § 5904.

¹²⁵ *Brown v. Trimble*, 48 Wash. 270, 93 Pac. 317.

¹²⁶ *Alberti v. Moore*, 20 Okla. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036.

formal validity of a mechanic's lien is not put in issue by a plea of payment; and hence, under such plea, the claim may be read to the jury as an admitted cause of action, and may be sent out with them.¹²⁷ On February 6, 1867, a lien law was approved and went into effect; it was held that no lien could attach for work done before February 7th.¹²⁸

§ 6076. **Set-off.**—The statute refers to offsets not arising under the terms of the contract; and the owner, in a suit by a subcontractor, is entitled to set off damages because of delay in the completion of the building.¹²⁹ Orders on the property-owner given by the contractor to the laborers are proper set-offs when paid; but if not paid until the foreclosure of the liens, the costs of foreclosure cannot be set off in an action to foreclose a lien for the contract price.¹³⁰ In a suit by a subcontractor a deduction for materials furnished the contractor, and not used, cannot be allowed.¹³¹ As to all mechanic's liens, except that of the contractor, the whole contract price shall not be diminished by any offset in favor of the reputed owner and against the contractor.¹³² But this does not include offsets arising under the terms of the contract, such as damages for delay, etc.¹³³

§ 6077. **Costs and expenses.**—The constitution imposes upon the legislature the duty of providing for these liens; and as the filing of the lien is a part of the legislative method of perfecting it, such expense is properly included in the phrase "costs and disbursements."¹³⁴ The court must allow, as a part of the costs, the money paid for filing and recording the lien.¹³⁵ This is not an unconstitutional statute.¹³⁶

§ 6078. **Attorney's fee.**—Section 1195 of the California Code of Civil Procedure provides for the allowance of a reasonable at-

¹²⁷ *Lybrandt v. Eberly*, 36 Pa. St. 347.

¹²⁸ *Hunter v. Savage Consol. Silv. Min. Co.*, 4 Nev. 153.

¹²⁹ *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909.

¹³⁰ *Boucher v. Bowers*, 29 Mont. 342, 74 Pac. 942; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

¹³¹ *Sierra Nevada Lumber Co. v. Whitmore*, 24 Utah, 130, 66 Pac. 779.

¹³² Cal. Code Civ. Proc., § 1184.

¹³³ *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909.

¹³⁴ *Id.*

¹³⁵ Cal. Code Civ. Proc., § 1195.

¹³⁶ *Builders' Supply Depot v. O'Connor*, 150 Cal. 265, 119 Am. St.

torney's fee as a part of the costs. The allowance is only to the one successfully claiming a mechanic's lien, and is therefore contrary to the federal constitution, which guarantees to every person the equal protection of the law, and contrary to the California state constitution, which provides that general laws shall be uniform, and prohibiting special laws, and giving the unalienable rights of acquiring, possessing, and protecting property.¹³⁷ This statute was sustained in a former appeal.^{137a} Such a law imposes a penalty upon the defendant for exercising, in this class of cases, the common right of making a defense, which is accorded to every other litigant in the courts, by subjecting him to the payment of the plaintiff's attorney fees if plaintiff is successful, without giving him the reciprocal right if plaintiff is not successful in his suit.¹³⁸ The same rule applies in the case of statutes allowing attorney's fees in suits brought by laborers for labor.¹³⁹

In Idaho and Washington, such a law allowing reasonable attorney's fees¹⁴⁰ has been held constitutional.¹⁴¹ In Montana, such fees are allowed,¹⁴² but not for the preparation and verification of the lien or abstract of title to the property.¹⁴³ The supreme court on appeal will not allow an additional attorney fee.¹⁴⁴

§ 6079. Judgment or decree.—A personal judgment cannot be entered against the landowner because the claim is enforceable only against the land and building itself.¹⁴⁵ Whenever in the sale of property subject to lien there is a deficiency of proceeds,

Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909.

¹³⁷ Id.; Union Lumber Co. v. Simon, 150 Cal. 751, 89 Pac. 1077, 1081; Stimson v. Nolan, 5 Cal. App. 754, 91 Pac. 262; Pacific Lumber Co. v. Wilson, 6 Cal. App. 561, 92 Pac. 654; Donaldson v. Orchard Crude Oil Co., 6 Cal. App. 641, 92 Pac. 1046; Los Angeles Pressed Brick Co. v. Los Angeles Pacific Boulevard etc. Co., 7 Cal. App. 460, 94 Pac. 775; Hill v. Clark, 7 Cal. App. 609, 95 Pac. 382.

^{137a} Peckham v. Fox, 1 Cal. App. 307, 82 Pac. 91.

¹³⁸ Davidson v. Jennings, 27 Colo. 187, 83 Am. St. Rep. 49, 60 Pac. 354, 48 L. R. A. 340; Perkins v. Boyd, 16 Colo. App. 266, 65 Pac. 350.

¹³⁹ Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263, 29 L. R. A. 386; Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.

¹⁴⁰ Wash. Bal. Codes, § 5911; Idaho Lien Laws 1899, p. 150, § 12.

¹⁴¹ Nelson Bennett Co. v. Twin Falls Land etc. Co., 14 Idaho, 5, 93 Pac. 789; Littell v. Saulsberry, 40 Wash. 550, 82 Pac. 909.

¹⁴² Mont. Rev. Codes, § 7166.

¹⁴³ Neuman v. Grant, 36 Mont. 77, 92 Pac. 43.

¹⁴⁴ Sweatt v. Hunt, 42 Wash. 96, 84 Pac. 1.

¹⁴⁵ Builders' Supply Depot v. O'Connor, 150 Cal. 265, 119 Am. St. Rep. 193, 88 Pac. 982, 17 L. R. A. (N. S.) 909.

judgment may be docketed for the deficiency as in foreclosure of mortgages.¹⁴⁶ The description of the land itself may be omitted where the building, being described, is ordered sold, together with the land upon which it was situated. In this case the notice of lien contained a description of the lot upon which the building stood, and the complaint incorporated the contents of the notice by reference thereto.¹⁴⁷ The decree need not declare how much land is necessary for occupation of the building.¹⁴⁸ A decree cannot be made in favor of a defendant subcontractor, who is not served, and who does not appear in court.¹⁴⁹

§ 6080. **Personal judgment.**—One seeking foreclosure of a mechanic's lien may have a personal judgment against the contractor, though he fails to establish his lien.¹⁵⁰ A subcontractor, materialman, or workman, having no privity of contract with the owner, cannot have a personal judgment against the owner. He may have a personal judgment against the contractor, and a decree establishing the lien and ordering sale of the property;¹⁵¹ and if the owner have money in his possession due the contractor, he may be made personally liable to the extent of such money by giving him notice to withhold the same.¹⁵² In the same action in which a subcontractor attempts to foreclose a mechanic's lien, the owner, having overpaid the contractor, may have a personal judgment entered against such contractor for the amount of the judgment, interest, and costs recovered by the subcontractor.¹⁵³

¹⁴⁶ Cal. Code Civ. Proc., § 1194.
See same code, § 726.

¹⁴⁷ *Newell v. Brill*, 2 Cal. App. 61, 83 Pac. 76.

¹⁴⁸ *Sidlinger v. Kerkow*, 82 Cal. 45, 22 Pac. 932.

¹⁴⁹ *Alberti v. Moore*, 20 Okla. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036.

¹⁵⁰ *Western Plumbing Co. v. Fried*,

33 Mont. 7, 114 Am. St. Rep. 799, 81 Pac. 394.

¹⁵¹ *Alberti v. Moore*, 20 Okla. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036; *Merced Lumber Co. v. Bruschi*, 152 Cal. 372, 92 Pac. 844.

¹⁵² *Hughes Bros. v. Hoover*, 3 Cal. App. 145, 84 Pac. 681.

¹⁵³ *Alberti v. Moore*, 20 Okla. 78, 93 Pac. 543, 14 L. R. A. (N. S.) 1036.

FORMS—FORECLOSURE OF MECHANIC'S LIENS.

§ 6081. Complaint—Common form—Contractor against owner.

Form No. 1697.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., plaintiff and defendant entered into an agreement in writing, whereby the plaintiff agreed to furnish the material and erect for the defendant a certain building upon the lands hereinafter described, and that the defendant agreed to pay him therefor the sum of . . . dollars upon the completion thereof, a copy of which said agreement is hereto attached and made part of this complaint. And the plaintiff avers that he completed said building, under said contract, on the . . . day of . . . , 19.., and that he has fully kept and performed the said agreement in all things to be by him kept and performed, but the said defendant has not paid the said sum of . . . dollars, mentioned in said agreement, nor any part thereof.

II. That the lands upon which said building was so erected under said contract, are described as follows, to-wit: [Insert such description as would be proper in a mortgage.] And he avers that the whole thereof is required for the convenient use and occupation of said building.

III. That at the date of said contract, the defendant was the owner, and reputed owner, of the lands hereinbefore described; and ever since has been, and now is the owner and reputed owner of said land and the said building so erected thereon.

IV. That the plaintiff began to furnish material for said building and to perform labor thereon, under said contract, on the . . . day of . . . , 19.., and that all the said materials were furnished and the said building erected between that day and the . . . day of . . . , 19.., on which last-named day said building was completed.

V. That on the . . . day of . . . , 19.., the plaintiff for the purpose of securing and perfecting a lien for the moneys so due him as aforesaid, under said contract, upon the building and lands hereinbefore described, under the provisions of chapter II of title IV of part III of the Code of Civil Procedure of the state of California, filed for record in the office of the recorder of the said

county of . . . his claim thereof, duly verified by him, a copy of which is hereto attached, marked "Exhibit B," and made part of this complaint; and which said claim was thereafter, on the same day, duly recorded in said office, in a book kept therein for that purpose, to-wit, in book . . . of liens, at page . . .

VI. That plaintiff paid for verifying and recording said lien the sum of . . . dollars.

Wherefore, the plaintiff prays judgment against the defendant for the sum of . . . dollars, remaining unpaid for said labor and materials, and for costs of suit, including . . . dollars paid for verifying and recording said lien; that said sum of . . . dollars, and the costs herein, be adjudged a lien upon the lands and premises hereinbefore described; that said land and premises may be sold under the order and decree of this court, and the proceeds thereof be applied to the payment of the costs of this suit and the sum so found due to the plaintiff; and that he have execution for any deficiency; and for such other relief as to the court seems proper.

A. B., Attorney for Plaintiff.

[VERIFICATION.]

[Annex copy of contract and of "Exhibit B."]

§ 6082. Complaint by subcontractor against owner and contractor, for labor and materials.

Form No. 1698.

[TITLE.]

The said plaintiff complains of the defendants, and alleges:

I. That the defendant A. B. is the owner and reputed owner of the following-described land and premises, situated in . . . county, state of California, to-wit: [Describe the land]; and was such owner and reputed owner at all the times hereinafter mentioned.

II. That on the . . . day of . . . , 19.., the defendant C. D. entered into a contract with said A. B., whereby he agreed to provide all the materials and labor and erect for said A. B. a certain building, to-wit, a dwelling-house, upon the land above described, and for which said A. B. agreed to pay said C. D. the sum of . . . dollars, at the times and in the manner following, to-wit: [State amount of payments, and when to be made.]

III. That said C. D. commenced the work of erecting said dwelling-house on said land pursuant to said contract, on the . . . day

of . . . , 19.., and fully completed the same under and according to the terms of his said contract, on the . . . day of . . . , 19.., and otherwise performed and fulfilled all the terms and conditions of said contract so far as they were to be performed by him; and plaintiff avers that there remains unpaid from the defendant A. B. to the defendant C. D., upon and for the erection of said building under said contract, the sum of . . . dollars, which said sum became due and payable on the . . . day of . . . , 19...

IV. That on the . . . day of . . . , 19.., the plaintiff entered into a contract with the defendant C. D., in and by which the plaintiff agreed to furnish the necessary and proper materials for painting said dwelling-house and to paint the same, and the defendant agreed to pay him the sum of . . . dollars therefor upon the completion of the painting thereof; and the plaintiff avers that on the . . . day of . . . , 19.., he furnished said materials, and painted said dwelling-house under and in pursuance of said contract, and completed the same on the . . . day of . . . , 19.., and has in all respects fully kept and performed his said agreement; yet the said defendant C. D. has not, nor has any one for him, paid to the plaintiff the said sum of . . . dollars, nor any part thereof.

V. Plaintiff avers that the whole of the land above described is required for the convenient use and occupation of said dwelling-house.

VI. That [follow paragraph V of form No. 1697].

VII. [Same as paragraph VI of No. 1697.]

VIII. [Same as paragraph VII of No. 1697.]

Wherefore, the plaintiff prays:

1. That the court may find and ascertain the amount due from the defendant C. D. to this plaintiff under said contract and that he have judgment against the said C. D. therefor.

2. That the court may find and ascertain what sum, if any, was due from the defendant A. B. to the defendant C. D. at the date of the filing of plaintiff's lien.

3. That it may be decreed by the court that the plaintiff has a lien upon said dwelling-house and the lands described herein for the sum so found due to him from the said C. D. and the costs of this action, including . . . dollars paid for verifying and recording said lien; that said land and dwelling-house may be sold under the order and decree of this court, and the proceeds applied to the payment of the costs aforesaid and the sum so found due to the

plaintiff; that he have execution against the said C. D. for any deficiency, and for other and further proper relief.

§ 6083. Complaint for foreclosure of mechanic's lien, for reasonable value of materials sold or labor furnished to owner.

Form No. 1699.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is now, and was at the times hereinafter stated, a contractor and builder, doing business as such at the . . . of . . . , state of . . . , and that as such contractor and builder, on and between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., at the special instance and request of the defendant [owner], and upon his promise to pay the reasonable value thereof, the plaintiff performed work and labor and furnished certain lumber and other building materials to the defendant in and about the erection, construction, and repair of a certain dwelling-house owned by the said defendant [owner], and situated upon the following-described premises: [Insert description]; and that said labor and materials were of the reasonable value of . . . dollars.

II. That the defendant was, at the dates hereinbefore mentioned, and still is, the owner and reputed owner of the premises hereinbefore mentioned; and that the said premises, and the whole thereof, are required for the convenient use and occupation of said dwelling-house.

III. That the date of completion of the construction of said building is . . . [or, if left incomplete: That the last date upon which said work and labor of constructing said building was performed, and said materials were furnished, is the . . . day of . . . , 19..] [If notice of completion was filed, allege same.]

IV. That the plaintiff duly filed, as required by law, his claim for a lien for the amount due and owing him as aforesaid from said defendant, in the office of the recorder of the said county of . . . , on the . . . day of . . . , 19.., and within ninety days from the date of the completion of said work, [or if left unfinished and no notice is given within one hundred and twenty days from the date of the cessation of labor upon the construction of said building and the furnishing of the building materials aforesaid,] which claim for a lien so filed was duly signed by the claim-

ant [or, by L. M., the attorney of the claimant], and contained a statement of the demand on which it is founded, the name of the person against whom the demand is claimed, the name of the claimant or assignee, the date of the completion of said work, [or, if left incomplete, the last date of the performance of labor or furnishing of materials,] a description of the property affected thereby, a statement of the amount claimed, and all other material facts in relation thereto, a copy of which claim is hereto annexed and made part of this complaint, and marked "Exhibit B."

V. That no part of the price or reasonable value of said labor and materials has been paid, except the sum of . . . dollars; that plaintiff demanded payment of the same on the . . . day of . . . , 19.., but that defendant refused to pay the same; and that there is now due and owing to the plaintiff from said defendant, on account of the performance of said labor and furnishing of said materials, the sum of . . . dollars, with interest thereon from the . . . day of . . . , 19.., *and said sum is wholly unpaid.*

VI. That the defendant [other lien claimant] has filed a claim for a lien upon the premises aforesaid, for the amount of . . . dollars and costs, which claim was filed in the office of the recorder of the county of . . . aforesaid, on the . . . day of . . . , 19.., for [state whether for materials or labor]; [and that no other claim for liens on said premises has been filed.]

VII. That the defendants [subsequent purchasers, or lien-holders] have or claim to have some interest in or lien upon said premises, which interest or lien, if any, is subsequent and subject to the lien of the plaintiff.

Wherefore, plaintiff demands judgment that the demands of all persons having filed claims for liens upon the premises aforesaid, whether plaintiffs or defendants, be ascertained and adjudged, and that the interest of [owner], the person owning said premises at the time of the commencement of the work and furnishing of the materials aforesaid upon the premises hereinbefore described, of, in, and to the premises aforesaid, or the interest therein which said [owner], or any person claiming under him, has since acquired, be sold, under the decree of this court, according to law, to satisfy the amount of the liens so ascertained and adjudged, with the costs of this action; and that in case of deficiency arising upon such sale, that the plaintiff have judgment for such deficiency against [defendants personally liable], and have execution therefor; and for such further relief as may be just and equitable.

§ 6084. Judgment of foreclosure of mechanic's lien.

Form No. 1700.

[TITLE.]

[Recite trial verdict or findings, and continue]: and due notice of the pendency of this action having been filed in the office of the county recorder of the county of . . . ;

Now, on motion of G. H., attorney for the plaintiff,—

It is adjudged:

1. That the amount due the plaintiff, A. B., from the defendant [name defendant or defendants who are personally liable to the plaintiff] is the sum of . . . dollars, and interest thereon from the . . . day of . . . , 19.., amounting to the sum of . . . dollars and . . . cents.

[If there are defendants who have established liens, adjudge the amount due each in the same way.]

2. That all said sum is due for work and labor performed and for materials furnished upon, in, and about the construction of a certain building, to-wit, [name or describe the building], on the following-described premises, to-wit, [describe same]; that the whole of said premises is required for the convenient use and occupation of said building; and that said premises and the interest of the defendant C. D. therein, at the time of the commencement of the work and furnishing of the materials aforesaid, to-wit, the . . . day of . . . , 19.., or which he has since acquired therein, are subject to a lien for all of said sum, under the provisions of chapter II of title IV of part III of the Code of Civil Procedure of the state of California, and the acts amendatory thereof.

3. That the said interest of said C. D. in and to the said building and premises above described be sold to satisfy the amount of the said several liens above specified, including the costs of this action and the costs of filing the claims for said liens.

4. That such sale be made by the sheriff of the county of . . . ; that the said sheriff give notice thereof in the manner provided by law; that said premises be sold in one parcel [or, if in parcels: in parcels as follows, describe parcels]; that out of the proceeds of such sale or sales the sheriff pay to G. H., plaintiff's attorney, the sum of . . . dollars, and interest thereon to the time of such sale, being the costs of this action; that he also pay to A. B., or his attorney, the sum of . . . dollars, the amount due him as herein adjudged, and . . . dollars, his costs of filing his claim for lien, with interest on said sums to the date of sale [insert same

directions as to other lien claimants]; that said sheriff make due return of such sale, and bring the residue of the proceeds of such sale into court, with the return of sale, to abide the order of the court.

5. That if the proceeds realized from said sale shall be insufficient, after paying the costs of the action and of making sale, to pay the full amount adjudged to be due to said claimants as above adjudged and directed, then the said sheriff pay and distribute the proceeds of such sale applicable thereto to each of said claimants in the proportion which the sum adjudged to each bears to the whole amount adjudged to all.

6. That if any deficiency arise upon such sale, in the payment of said sums so adjudged to be due, the said sheriff specify the same in his report of sale, and that judgment may be rendered therefor against the defendant, [name the defendant or defendants who are personally liable]; and that the purchaser or purchasers at such sale be entitled to a writ of assistance to obtain possession of the premises sold in manner provided by law.

By the court:

C. K., Clerk.

§ 6085. Judgment for deficiency on mechanic's lien judgment.

Form No. 1701.

[TITLE.]

The report of the sheriff of . . . county, who was directed to sell the premises described in the judgment in this action, having been filed on the . . . day of . . . , 19.., by which it appears that a deficiency [or, deficiencies] arose upon such sale in the payment of the amounts adjudged to be due to the lien claimants, as follows, to-wit: [here specify amount or amounts of deficiencies due each claimant]; [and the said report of sale having been duly confirmed by an order of the court, entered on the . . . day of . . . , 19..,] and judgment for deficiency [or, deficiencies] having been ordered:

On motion of G. H., attorney for the plaintiff,—

It is adjudged:

1. That the plaintiff, A. B., do have and recover of the defendant [name defendant personally liable], the sum of . . . dollars, the amount of such deficiency due to said A. B.

[Proceed in the same way as to all lien claimants entitled to judgment for deficiency.]

R. S., Judge.

CHAPTER CXLII.

FORECLOSURE OF STREET-ASSESSMENT LIEN.

§ 6086. **Priority of lien.**—A lien for street improvements is on the property, and is paramount to the lien of a mortgage existing at the time the proceedings leading up to the construction of the improvements were in progress.¹ However, a lien for general taxes is prior and superior to one for unpaid city assessments, and can be foreclosed without first paying the city assessment.² The time fixed when payment is due, may not be the time when the improvements become an incumbrance as between grantor and grantee.³

§ 6087. **Labor lien.**—One improving a lot at request of the owner is entitled to a lien thereon.⁴ A contractor who, under contract with the property-owners along a street, has constructed a sewer therein has a lien for such work;⁵ but the rule seems to be the opposite if no contract was entered into.⁶

§ 6088. **Continuance of the lien—Limitations.**—The lien of a street-improvement assessment continues for two years from the date of recording the warrant;⁷ but beginning suit does not continue the lien after the expiration of the two years as against a purchaser of the property not a party to the foreclosure suit, unless a notice of *lis pendens* has been filed.⁸ A complaint filed more than two years after the date of recording the warrant is too late, and is subject to demurrer.⁹ The period of limitation may be extended by statute any time before expiration, under the old

1 O'Dea v. Mitchell, 144 Cal. 374, 77 Pac. 1020; Chase v. Trout, 146 Cal. 350, 80 Pac. 81.

2 McMillan v. City of Tacoma, 26 Wash. 358, 67 Pac. 68; Keene v. City of Seattle, 31 Wash. 202, 71 Pac. 769.

3 Green v. Tidball, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879.

4 Cal. Code Civ. Proc., § 1191.

5 Williams v. Rowell, 145 Cal. 259, 78 Pac. 725.

6 Fleming v. Prudential Ins. Co., 19 Colo. App. 126, 73 Pac. 752; 2 Mills' Annot. Stats., § 2867.

7 Street Imp. Act, Stats. 1891, p. 205, § 9. See, also, Cal. Gen. Laws, Act 3930, § 9.

8 Page v. W. W. Chase Co., 145 Cal. 578, 79 Pac. 278.

9 Williamson v. Joyce, 140 Cal. 669, 74 Pac. 290.

statute.¹⁰ A general law as to limitations will not affect the special law on that subject.¹¹

§ 6089. Parties.—A wife is a necessary party to an action to foreclose a city assessment lien on community property.¹² Failure to amend the complaint by striking out the names of the fictitious persons is not prejudicial.¹³ The owner of bonds issued to raise money for sewer improvements, upon failure of the city to collect assessments to pay the same when due, may himself proceed to collect the same and foreclose the lien thereof.¹⁴

§ 6090. Complaint.—The complaint need not allege that the width of the sidewalk to be constructed has been established by the board of supervisors before the institution of the proceedings for doing the work.¹⁵ An allegation that the city council, deeming it necessary, "duly gave and made its determination to order the work done," is a statement in legal effect that everything necessary to be done to give the order validity had been done, and the complaint need not set forth the steps required by the statute to give the city council jurisdiction to order the work done.¹⁶ But the complaint is insufficient if it fails to show that the contract for the work done fixed the time for the commencement and completion of the work to be done thereunder, in accordance with the requirements of the California statute.¹⁷ So a complaint to foreclose a street-assessment lien, which shows that bids were to be received until four o'clock in the afternoon of a certain date, and that the bids were opened, examined, and declared by the board on the day preceding, and that, in pursuance thereof, the board awarded the contract to the plaintiff, shows on its face that the proceedings of the board in awarding the contract were void, and a general demurrer to such complaint is well taken.¹⁸

¹⁰ *Young v. City of Tacoma*, 31 Wash. 153, 71 Pac. 742.

¹¹ *Mathews v. Wagner*, 49 Wash. 54, 94 Pac. 759.

¹² *McNair v. Ingebrigtsen*, 36 Wash. 186, 78 Pac. 789.

¹³ *Belser v. Allman*, 134 Cal. 399, 66 Pac. 492.

¹⁴ *Blackwell v. Village of Cœur d'Alene*, 13 Idaho, 357, 90 Pac. 353.

¹⁵ *Doane v. Houghton*, 75 Cal. 360, 17 Pac. 426.

¹⁶ *Pacific Paving Co. v. Bolton*, 97 Cal. 8, 31 Pac. 625. See *Oakland Bank v. Sullivan*, 107 Cal. 428, 40 Pac. 546.

¹⁷ Act of March 18, 1885, (Stats. 1885, p. 147,) as amended in 1889 (Stats. 1889, p. 157); *Washburn v. Lyons*, 97 Cal. 314, 32 Pac. 310; *Libbey v. Elsworth*, 97 Cal. 316, 32 Pac. 228.

¹⁸ *Perine etc. Paving Co. v. Quackebush*, 104 Cal. 684, 38 Pac. 533.

§ 6091. Foreclosure of street assessment—Collateral attack.—

A decree foreclosing the lien of a street assessment which is valid on its face, and rendered in an action in which the court had jurisdiction of the subject-matter and the person of the defendant, cannot be collaterally attacked by a person claiming under him, by showing that prior to the decree the assessment in question had been paid.¹⁹

§ 6092. Pleading judgment.—In pleading a judgment or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made.²⁰ But if the complaint discloses a void and insufficient resolution of intention, it is not cured by the general clause that all and singular the proceedings and orders were “duly given or made.”²¹

§ 6093. Warrant.—The street superintendent must issue a warrant to the contractor authorizing him to collect the assessment; but before such delivery it must be recorded in his office and becomes a lien from such recording. If the contractor fails to return the warrant within thirty days from the date of its recordation, he is presumed to have collected the assessment and loses his lien.²²

§ 6094. Demand on warrant.—The contractor or his agent must make a demand upon the person assessed, if he can be conveniently found, or publicly upon the premises assessed, and, if paid, receipt such payment upon the assessment, and also by separate receipt, if demanded. The street superintendent may receipt for the same, or release the lien at any time, upon receipt of the money or the exhibition of the contractor's receipt therefor. After demand and return unpaid, the assessment draws interest at the rate of ten per cent per annum.²³ The return of the demand need not specify to whom the money was to be paid.²⁴ The return and affidavit may be made by the contractor's agent who made the demand.²⁵

¹⁹ Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151, 17 Pac. 193.

²⁰ Cal. Code Civ. Proc., § 456.

²¹ Buckman v. Hatch, 139 Cal. 53, 72 Pac. 445.

²² Street Imp. Act, § 9, Stats. 1891, p. 205; Cal. Gen. Laws, Act 3930, § 9;

Cotton v. Watson, 134 Cal. 442, 66 Pac. 490.

²³ Cal. Gen. Laws, Act 3930, § 10.

²⁴ Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

²⁵ San Francisco Pav. Co. v. Egan, 146 Cal. 635, 80 Pac. 1076.

§ 6095. **Bond of contractor.**—Every contract required to be filed shall be accompanied by a good and sufficient bond equal to at least twenty-five per cent of the contract price, to be filed with the contract. Such bond must be for the benefit of any and all persons performing labor or furnishing materials, who may recover upon such bond for the same; but suit on the bond does not affect the lien on the land, except in so far as the claim is thereby paid off. If the bond is not filed, the owner and contractor become jointly and severally liable in damages to any and all parties entitled to liens upon the property affected by the contract.²⁶ The foregoing section has been held unconstitutional in several cases, upon the grounds that the owner is deprived of his property unjustly, as he is made responsible for the bad management of the contractor or a raise in price of materials; as it is an unnecessary and unreasonable restraint upon the power to contract; and as it forces the owner to pay more than his contract price.²⁷

§ 6096. **Foreclosure of street assessment—Answer.**—In an action to recover a street assessment, where the defendant's ownership of the property assessed is alleged in the complaint and denied by the answer, a nonsuit should be granted if the plaintiff introduces no evidence in support of the allegation.²⁸ An answer alleging that another person, not sued, owns an undivided interest in the land is, in legal effect, merely a denial of the averment of the complaint as to ownership by the defendant, and is not an averment of new matter casting the burden of proof upon the defendant.²⁹ In such an action, an averment in the answer that the defendant had not sufficient information or belief on the subject of his ownership of the property assessed to enable him to answer the plaintiff's allegation of his ownership, and therefore denies the same, is a sufficient denial, where no motion is made to strike it out.³⁰ That the work was not done according to contract is no defense, if such objection was not urged by appeal to the city council.³¹ A defense, to be good, must show that plaintiff has been

²⁶ Cal. Code Civ. Proc., § 1203.

²⁷ *Gibbs v. Tally*, 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815; *San Francisco Lumber Co. v. Bibb*, 139 Cal. 193, 72 Pac. 964, 139 Cal. 325, 73 Pac. 864; *Montague & Co. v. Furness*, 145 Cal. 205, 78 Pac. 640.

²⁸ *Harney v. McLeran*, 66 Cal. 34, 4 Pac. 884.

²⁹ *Robinson v. Merrill*, 87 Cal. 11, 25 Pac. 162.

³⁰ *Harney v. McLeran*, 66 Cal. 34, 4 Pac. 884.

³¹ Act of March 18, 1885; *Peta-*

prejudiced. The right to damages arises solely from the constitutional provision that private property cannot be damaged for public use without compensation, and does not affect the right of the city to make the assessment to pay the costs of the work.³² Denials must be specific.³³

§ 6097. **Payment of part.**—If a part only is excessive, before a property-owner can refuse to pay the assessment, he must tender the amount justly due.³⁴

§ 6098. **Estoppel.**—A party having part of his land condemned for a street, and some of it illegally sold for a benefit assessment, may accept his award out of the fund created from such sale and assessment, and not be estopped from recovering the land wrongfully sold.³⁵ Failure to appeal to the city council to remedy a disproportionate assessment estops the landowner from setting up such defense in the action to enforce the assessment.³⁶

§ 6099. **Contract void for want of labor clause.**—Absence from the specifications and notices of the clause fixing the maximum hours and the minimum daily pay of laborers is cured by its insertion into the contract, if the letting of the job is in fact made to the lowest bidder.³⁷

§ 6100. **Restraining sale.**—A complaint in a suit to enjoin the sale of property for the collection of an assessment must aver that the benefit to plaintiff's property is not proportional to his tax.³⁸ Owners of a part interest in property cannot restrain the sale of the property under a valid assessment without paying or tendering their part of the assessment.³⁹ Several owners may join in the same suit.⁴⁰ Collection may be enjoined where the city council proceeds in opposition to the owners of more than half the prop-

Iuma Pav. Co. v. Singley, 136 Cal. 616, 69 Pac. 426.

³² *Duncan v. Ramish*, 142 Cal. 686, 76 Pac. 661.

³³ *City Street Imp. Co. v. Rontet*, 140 Cal. 55, 73 Pac. 729.

³⁴ *Hallett v. United States Security etc. Co.*, 40 Colo. 281, 90 Pac. 683.

³⁵ *Gaston v. City of Portland*, 41 Or. 373, 69 Pac. 34, 445.

³⁶ *Beckett v. Morse*, 4 Cal. App. 228, 87 Pac. 408.

³⁷ *Flinn v. Peters*, 3 Cal. App. 235, 84 Pac. 995.

³⁸ *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410.

³⁹ *Ellis v. Witmer*, 134 Cal. 249, 66 Pac. 301.

⁴⁰ *Coleman v. Rathbun*, 40 Wash. 303, 82 Pac. 540.

erty.⁴¹ The judgment should not enjoin the city from collecting any further amount on account of the improvement, the city being entitled to make a reassessment.⁴²

§ 6101. **Burden of proof.**—Defendant contesting the assessment has the burden of establishing the invalidity or irregularity of the proceedings.⁴³ The burden is thrown on defendant by introducing in evidence the assessment, the documents connected therewith, and the affidavits of demand and non-payment.⁴⁴ The warrant empowering the contractor to demand the assessment, the certificate, the diagram, and the affidavit of demand and non-payment establish a *prima facie* case, including the fact that the width and grade of the street have been officially established.⁴⁵

§ 6102. **Decree.**—A judgment on demurrer is erroneous which recites the demurrer to be sustained because the return was defective, when the ground is that the warrant was not returned in time.⁴⁶ Upon judgment the lien is merged therein and remains a lien, as such judgment, according to the law of judgment liens.⁴⁷ It is proper to make the attorney fee allowed plaintiff a lien upon the land assessed.⁴⁸ A judgment conditioned upon payment of a part admitted to be due may be had.⁴⁹

§ 6103. **Sale under foreclosure.**—The court may appoint a commissioner to sell the property on foreclosure of the lien for street assessment, though section 726 of the Code of Civil Procedure was enacted after the street-improvement act.⁵⁰ The improvement act authorizes the court to order sale on execution as in other cases of sale of real estate by the process of the court.⁵¹ A sale by

⁴¹ Hensley v. City of Butte, 33 Mont. 206, 83 Pac. 481; Mont. Sess. Laws 1897, p. 219, § 31.

⁴² Lester v. City of Seattle, 42 Wash. 539, 85 Pac. 14.

⁴³ San Francisco Pav. Co. v. Bates, 134 Cal. 39, 66 Pac. 2; Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

⁴⁴ Belser v. Allman, 134 Cal. 399, 66 Pac. 492.

⁴⁵ Blanchard v. Ladd, 135 Cal. 212, 67 Pac. 130; Dowling v. Hibernia Sav. etc. Soc., 143 Cal. 425, 77 Pac. 141.

⁴⁶ City Street Imp. Co. v. Emmons, 138 Cal. 297, 71 Pac. 332.

⁴⁷ Hinckley v. City of Seattle, 37 Wash. 269, 79 Pac. 779.

⁴⁸ Reid v. Clay, 134 Cal. 207, 66 Pac. 262.

⁴⁹ Coleman v. Rathbun, 40 Wash. 303, 82 Pac. 540.

⁵⁰ Crane v. Cummings, 137 Cal. 201, 69 Pac. 984.

⁵¹ Street Imp. Act, § 12, Stats. 1885, p. 157.

the city treasurer, noticed to take place "at the easterly door of the county courthouse," it not appearing that such is the front of the courthouse, or that any side had been prescribed by the board of supervisors⁵² as the front of the courthouse, is a void sale.⁵³

§ 6104. **Title acquired.**—One who purchases property at a sale under special assessment cannot recover from the city on the certificate when the city is estopped from enforcing the lien.⁵⁴ A sale under the bond act gives good title as against a mortgagee holding prior to the assessment proceedings.⁵⁵ The quitclaim deed of defendant conveys no title after foreclosure and sale.⁵⁶

FORMS—FORECLOSURE OF STREET ASSESSMENTS.

§ 6105. **Complaint in action on street assessment**—Under California statute.

Form No. 1702.*

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the board of supervisors of the county of . . . , state of . . . , adopted a resolution, whereby said board resolved that it was their intention to order the following described work in said county to be done, to-wit: [That . . . street, from the easterly line of . . . street to a point . . . feet westerly therefrom, be macadamized and curbed.]

II. That afterwards, and on the . . . day of . . . , 19.., a resolution ordering said work to be done was adopted and passed by said board of supervisors.

III. That the plaintiff was the contractor therefor, and did all said work under the direction and to the satisfaction of [state the appropriate officer], and the said work was duly approved and accepted by him, who thereupon, on the . . . day of . . . , 19.., made an assessment of the total amount of expense of said work

⁵² Cal. Pol. Code, § 3768.

⁵³ Lantz v. Fishburn, 3 Cal. App. 662, 91 Pac. 816.

⁵⁴ Elder v. Fox, 18 Colo. App. 263, 71 Pac. 398.

⁵⁵ German Sav. etc. Soc. v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067.

⁵⁶ Wright v. Jessup, 44 Wash. 618, 87 Pac. 930.

*For forms of Lis Pendens see chapter XLIII.

necessary to be assessed to recover the sum due for said work and the incidental expenses thereof upon the lots and lands liable to assessment therefor, to-wit [describe such property], and each lot and part thereof was thereby separately assessed in proportion to its frontage on said streets, at the rates hereinafter stated per front foot; that a copy of said assessment, and warrant issued in said case, and hereinafter referred to, is attached to this complaint and made a part thereof.

IV. That by said assessment and diagram the lot of land hereinafter described was assessed as the property of the defendant; that the said defendant, during all the times herein mentioned, was, and now is, the owner of certain portions of the lots and lands aforesaid assessed, and liable to assessment for said work; that said lands are described as follows [give description of land].

V. That by and according to said assessment, said lot of land was assessed to pay the sum of . . . dollars, rated at . . . dollars per foot fronting on said . . . street, for said work done thereon, in front thereof, and the further sum of . . . dollars for its proportion of the expense of said work done on the crossing of . . . street and . . . street.

VI. That on the . . . day of . . . , 19.., the said [superintendent of streets, or other proper officer] duly issued and delivered a certain warrant, with said assessment and diagram, to the plaintiff; that a copy of said warrant is hereunto attached and made a part of this complaint; that said warrant, diagram, and assessment were, on said last-mentioned day, all duly recorded by said superintendent in his office, in a book kept by him for such purpose, to-wit, in

VII. That afterwards, and within ten days after the . . . day of . . . 19.., with and by virtue of said warrant, assessment, and diagram, said plaintiff demanded payment of said sums so assessed on said premises from the defendant; that he refused and still does refuse to pay the same, and has not paid any part thereof.

VIII. That thereafter, within ten days from the date of said warrant, to-wit, on the . . . day of . . . , 19.., the same was duly returned to the said superintendent with a return thereon, signed by said plaintiff and verified by his oath, stating the nature and character of the demand as set forth aforesaid, and whether any of the said assessments remained unpaid in whole or in part, and the amount of said assessments so unpaid were fully stated, as also the fact that said sum of money so assessed on the lot of

land above described had been demanded as stated aforesaid, and still remained unpaid.

IX. That thereupon, to-wit, on the . . . day of . . . , 19.., the said superintendent duly recorded the said return, so made upon said warrant, in the margin of the record of said warrant and assessment, and also the original contract referred to therein, at full length in a book kept by him for that purpose in his office, and signed the said record.

X. That more than fifteen days have elapsed since the day of the date of said warrant, and no person has appealed to said board of supervisors concerning the acts, proceedings, or determination of said superintendent in relation to said work, contract, diagram, warrant, or assessment, or either of them.

XI. That all the acts of said superintendent herein mentioned and referred to, were done by him in his official character of superintendent of public streets and highways of said county. And that said sum of . . . dollars, being the sum assessed by him on said lot of land hereinbefore described, has not been paid, nor any part thereof, but still remains due and unpaid, although the same has been demanded as stated aforesaid, with the interest thereon at the rate of one per cent per month, from the . . . day of . . . , 19...

Wherefore the plaintiff demands judgment for . . . dollars, with interest at the rate of ten per cent per annum from the . . . day of . . . , 19.., and that said sum be adjudged a lien against the lot of land described aforesaid, and that said lot of land be adjudged and decreed to be liable for the payment of the same, and that the same be sold, and the proceeds of the sale thereof be applied to the payment of the amount found due by the plaintiff.

§ 6106. Complaint in foreclosure of street-assessment lien under Vrooman act.

Form No. 1703.

[TITLE.]

For cause of action, plaintiff complains and alleges:

I. That defendants, . . . , are, and at all times herein mentioned have been, the owners of the following-described property: [Describe property.]

II. That on the . . . day of . . . , 19.., at and in the city of . . . , county of . . . , state of California, the board of trustees

of the city of . . . , at its council chambers in said city, duly passed and adopted a resolution, in writing, wherein and whereby said board of trustees resolved and determined that it was the intention of said board of trustees to order the following street work to be done in said city of . . . , to-wit: [Description of work as set out in the resolution of intention.]

[If the cost is assessed to a district instead of a frontage assessment, then as follows:] That in and by said resolution of intention, the said board of trustees, deeming said work to be of more than local and ordinary benefit, declared that the costs and expenses of said work and improvement should be, and by said resolution of intention it was, made chargeable upon a district to be known as “ . . . district No. . . . ,” which said district said board of trustees in said resolution of intention declared to be the district to be affected and benefited by said work and improvement, and to be assessed to pay the costs and expenses thereof. The exterior boundaries of said district were by said resolution established and fixed as follows, to-wit: [Description.]

III. That said board of trustees directed the city engineer of the city of . . . to make a diagram of the property affected and benefited by said proposed work and improvement, and described in said resolution of intention, and to be assessed to pay the expenses thereof; that said city engineer did, pursuant to the direction of said board of trustees, make a diagram of the property affected and benefited by the proposed work and improvement, as described in said resolution of intention; that said diagram showed each separate lot, piece, and parcel of land, the area in square feet of each of such lots, pieces, and parcels of land, and the relative location of the same to the work proposed to be done, all within the limits of the said assessment district; that said diagram so prepared as aforesaid was, on the said . . . day of . . . , 19.., by resolution therefor, duly approved by the board of trustees of the city of . . . ; that the city clerk of said city of . . . did, at the time of such approval aforesaid, certify the fact and date thereof, and did immediately thereafter deliver said diagram to the superintendent of streets of the said city of . . .

IV. That thereafter, to-wit, on the . . . day of . . . , 19.., at and in the city of . . . , county of . . . , state of California, the board of trustees of the city of . . . , at its council chamber in said city, deeming that the public interest required it, duly passed and adopted a resolution, in writing, wherein and whereby said

board of trustees duly made and gave its order and determination, in writing, ordering the said described street work to be done.

V. That thereupon and before awarding the contract for doing said work as hereinafter alleged, the said board of trustees of the city of . . . , by order duly given and made, and contained in said resolution above referred to ordering said work to be done, duly ordered and directed the city clerk of said city of . . . to publish in the manner required by law said resolution ordering said work to be done, for two days in the . . . , and to post, and to keep posted conspicuously for five successive days, in the manner and form required by law, on or near the council chamber door of said board of trustees, a written notice, with specifications, inviting sealed proposals or bids for doing said work, and also to publish in the manner and form required by law in said . . . , for two days successively, a notice of said work, inviting sealed proposals therefor, and referring to the specifications posted and on file.

VI. That said . . . is, and at all times herein mentioned was, a daily newspaper, printed, published, and circulated in said city of . . . daily [except Sunday], and was the newspaper designated by the said board of trustees for the purpose of said publications and of each of them.

VII. That thereupon, and before the awarding of said contract, said city clerk, pursuant to the terms and directions of said order, and in his official capacity as such clerk, duly caused the said resolution ordering said work to be done to be published by two insertions for and on two successive days in said newspaper, and the same was duly published by two insertions for and on two successive days in said newspaper, as ordered and directed by said board of trustees, and as caused to be published by said city clerk, to-wit, on the . . . and the . . . days of . . . , 19...

VIII. That before passing said resolution ordering said work to be done, specifications for the construction of said work were furnished to said board of trustees by the city engineer of said city of . . . , acting in his official capacity as such city engineer.

IX. That thereafter, and before the awarding of said contract, and pursuant to the terms and directions of said order of said board of trustees ordering and directing him so to do, as aforesaid, said city clerk of the city of . . . , in his official capacity as such, on the . . . day of . . . , 19.., posted for five consecutive days, to-wit, the . . . , . . . , . . . , . . . , and . . . days of . . . ,

19.., and kept posted conspicuously on said council-chamber door a printed notice, with the specifications, inviting sealed proposals or bids for doing said work.

X. That pursuant to the said order and directions of said board of trustees duly given and made and contained in said resolution ordering said work to be done, ordering and directing him so to do, said city clerk of the city of . . . , in his official capacity as such, duly published in the . . . , by two insertions for two days, and as often as said paper was issued, to-wit, on the . . . and . . . days of . . . , 19.., a printed notice of said work, describing the same, inviting sealed proposals or bids for doing said work, and referring to the specifications so posted as aforesaid and to the specifications on file, and said notice was duly published in said . . . on said . . . and . . . days of . . . , 19..

XI. That thereafter, to-wit, on the . . . day of . . . , 19.., and within the time specified in said notice inviting proposals or bids for doing said work, said plaintiff, . . . delivered to said city clerk a sealed proposal, wherein and whereby said . . . proposed and offered to do said work fully and in all respects as required by said specifications at the following prices, to-wit: [Insert bid.]

That said proposal was accompanied by a bond for an amount equal to ten (10) per cent of the aggregate of the said proposal, payable to the mayor of said city of . . . , signed by the said bidder, and by two sureties, which said sureties did justify before . . . , a notary public in and for the county of . . . , state of California, in double the said amount specified therein, over and above all statutory exemptions, and the said . . . , plaintiff, then and there became, and was, and continued to be, a responsible bidder for said work, until the award to him of the contract for said work, as hereinafter alleged.

XII. That on the . . . day of . . . , 19.., said board of trustees, in open session, at its council chamber in said city of . . . , opened all of the sealed proposals to do said work, and then and there duly examined and publicly declared the same, and at the same time and place considered all of said proposals, and then and there rejected each and all of said proposals or bids, excepting the said proposal of . . . , and that said proposal of said . . . was the lowest proposal or bid of any reasonable bidder therefor, and that said proposal of said . . . was found to be the proposal of the lowest responsible bidder.

XIII. That said board of trustees of said city of . . . , on said

. . . day of . . . , 19.., at its said session at said council chamber, duly passed a resolution, in writing, wherein and whereby said board of trustees duly awarded the contract for said work to said . . . , at the said prices named in his said proposal, and then and there rejected all other proposals and bids; that said resolution awarding the contract for said work to said . . . was passed and approved by a three-fourths vote of said board of trustees, and also approved by the mayor of said city of

XIV. That at the same time and place, by order duly given and made, and as a part of said resolution awarding said contract, said board of trustees of said city of . . . ordered and directed said city clerk to post notices of said award for five days on or near the council-chamber door of said board of trustees, and duly ordered and directed said city clerk to publish notice of said award for two days in the . . . , a daily newspaper published and circulated in said city of . . . , and designated by said board of trustees therefor.

XV. That said . . . was the newspaper designated by said board of trustees for said publication, and was at all times herein mentioned a daily newspaper, printed, published, and circulated in said city of . . . daily [except Sundays].

XVI. That thereafter, to-wit, on the . . . day of . . . , 19.., the said city clerk, acting in his official capacity as such, pursuant to the terms of said order and direction ordering and directing him so to do, posted said notices of said award conspicuously on said council-chamber door of said board of trustees, and kept the same posted for five consecutive days, to-wit, [give dates] of . . . , 19.., and at the same time, and pursuant to the terms of the same order and direction, said city clerk caused a like notice of said award to be published in the . . . , by two insertions for two consecutive days, as often as said newspaper was published, to-wit, on the . . . and . . . days of . . . , 19..

XVII. That the owners of three fourths of the lots and lands included within said assessment district did not, nor did the owners of three fourths of the frontage of the lots and lands fronting upon the streets and alleys where said work was ordered to be done, either in themselves or in their own names, or by or through their agents or otherwise, elect within ten days after the first posting and publication of said notice of award, or at any time, to take said work or any part thereof, or to enter upon said contract to do the whole or any part of the said contract at the price

at which the same had been awarded, as aforesaid, or at any other price, but that said owners failed to elect to take said work or to enter into a written or other contract therefor within ten days after the first posting and publication of said notice of award, or at all.

XVIII. That thereafter, to-wit, on the . . . day of . . . , 19.., in the said city of . . . , pursuant to said award, the superintendent of streets of said city of . . . , in his official capacity as such superintendent of streets, duly entered into, made, and executed to and with said . . . a contract, in writing, for said work at the price specified in the proposal or bid of said . . . , and that said contract was then and there duly signed, entered into, and executed by said superintendent of streets and by said . . . ; that said superintendent of streets, in and by said contract, fixed the time for the commencement of said work to be within fifteen days from the date of said contract, and for the completion thereof to be within one hundred and twenty (120) days thereafter; that said contract contained a provision that all work done thereunder should be done under the direction and to the satisfaction of the superintendent of streets of said city of . . . , and also contained an express notice that in no case would the said city of . . . , nor any officer thereof, be liable for any portion of the expense of said work, nor for any delinquency of persons or property assessed. and also contained an agreement that under said contract eight hours' labor should constitute a day's work, and that said . . . should not require more than eight hours' labor from any person employed by him thereunder.

XIX. That before executing the said contract with said superintendent of streets, as aforesaid, said . . . , as such contractor, filed with said superintendent of streets, a good and sufficient bond, approved by the mayor of said city of . . . , in the sum of . . . dollars, which said amount is more than one half of the total amount payable by the terms of said contract; that said bond was executed by said . . . , as principal, and by . . . and . . . , as sureties, each of which said sureties qualified for double the sum specified in said bond, and said bond was made to inure to the benefit of any and all persons, companies, or corporations who should perform labor on, or furnish materials to be used on, said work and improvement, and provided that if a contractor to whom said contract was awarded, as aforesaid, should fail to pay for any materials so furnished for the work and improvement, or for

any work or labor done thereon of any kind, that the sureties would pay the same to an amount not exceeding the amount specified in said bond.

XX. That said . . . , at the time of executing said contract with the said superintendent of streets, as aforesaid, executed a bond to the satisfaction and approval of said superintendent of streets, with two good and sufficient sureties, payable to the said city of . . . , in the sum of . . . dollars, gold coin of the United States of America, conditioned for the faithful performance of said contract; that said sum of . . . dollars was deemed adequate by the mayor of said city of . . . , and fixed by him for that purpose, and said sureties, each for himself, justified in double the amount mentioned in said bond over and above all statutory exemptions before a duly appointed and qualified notary public; that said bond was thereupon duly accepted by said superintendent of streets, and filed and recorded in the office of said superintendent of streets of said city of . . . , in volume . . . of sewer-assessment rolls of said city of . . . , at page . . . et seq. thereof.

XXI. That before the execution of said contract, as aforesaid, and after said award, said . . . advanced to and deposited with said superintendent of streets of said city of . . . , for payment by him of the costs and expenses of publication of all notices, resolutions, orders, and other incidental expenses and matters required under the proceedings prescribed in an act of the legislature of the state of California, entitled "An act to provide for work upon streets, alleys, lanes, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and all acts amendatory thereof, and likewise the costs of such other notices as might be deemed requisite by said board of trustees of said city of

XXII. That said . . . , contractor, commenced said work within fifteen days from the date of said contract, and thereafter, and within the time fixed by the said superintendent of streets, and by said contract for the completion of the same, said . . . did all the work described in said contract according to the specifications therefor, and duly performed all the conditions therein contained on his part to be performed, under the direction and to the satisfaction of said superintendent of streets, and with the materials required by him, and called for by said specifications, and duly fulfilled said contract to the satisfaction of said superintendent of streets.

XXIII. That, pursuant to the said contract, the total contract price of the work performed thereunder by said . . . , and prescribed for in said contract, amounted to the sum of . . . dollars; that the incidental expenses incurred in connection therewith, and paid by said . . . , to-wit, the expense of printing and publishing said resolutions and orders, special inspectors' fees, [etc.], amounted to the sum of . . . dollars, making a total of . . . dollars assessable against the lots and lands liable to assessment therefor.

XXIV. That thereupon and thereafter the superintendent of streets of the said city of . . . proceeded to estimate upon the lands, lots, and portions of lots within said assessment district, as shown by the diagram thereof, hereinafter referred to, the benefits arising from said work, and to be received by each such lot, portion of such lot, piece or subdivision of land, and did thereupon assess upon and against said lands in said assessment district the total amount of the costs and expenses of such work, and did assess said total sum upon the several pieces, parcels, lots, portions of lots, and subdivisions of land in said district benefited thereby, to-wit, upon each respectively in proportion to the estimated benefits to be received by each of said several lots, portions of lots, or subdivisions of land; that said assessment briefly referred to the contract, the work contracted for and performed, and showed the amount to be paid therefor, together with the incidental expenses thereof, and the amount of each assessment; that the name of the owner of each respective lot or portion of lot being unknown to said superintendent of streets, the word "unknown" was written opposite the number of each lot, and the amount assessed thereon, the number of each lot, portion or portions of the lot assessed, and had attached thereto a diagram exhibiting each street, street-crossing, lane, alley, place, and court on which any of said work had been done, and showed the relative location of each district, lot, and portion of the lot to the work done, and numbered to correspond with the numbers in the assessment, and the number of lots assessed for said work, so contracted for and performed, as aforesaid.

XXV. That in and by said assessment and diagram said lot hereinbefore, in paragraph one hereof described, was separately assessed in proportion to the benefits arising from such work, and to be received by such lot described as aforesaid; that is to say, there was assessed against said lot the sum of . . . dollars.

XXVI. That to the said assessment and diagram was attached a warrant dated . . . , 19.., which said warrant was duly issued and signed by the superintendent of streets of said city of . . . , in his official capacity as such, and duly countersigned by the mayor of said city of . . . , acting in his official capacity. Said warrant was in the words and figures following, to-wit: [Copy of warrant.]

XXVII. That thereafter, to-wit, on the . . . day of . . . , 19.., said warrant, assessment, and diagram, together with the certificate of the city engineer of said city relating to said work, were duly recorded by said superintendent of streets in his office, in a book kept by him for the purpose, to-wit, in volume . . . of . . . assessment rolls of the city of . . . , at page . . . et seq. thereof.

XXVIII. That thereafter, to-wit, on the . . . day of . . . , 19.., and after the payment of said superintendent of streets of all incidental expenses not previously paid by said . . . or his assigns, said warrant, assessment, diagram, and certificate, after the recording of the same as aforesaid, were duly delivered by said superintendent of streets to said . . . , contractor as aforesaid, upon his demand therefor.

XXIX. That thereafter, to-wit, on the . . . day of . . . , 19.., between the hours of nine o'clock A. M. and four P. M. of said day, said . . . did publicly go, with said warrant, assessment, diagram, and certificate, upon said lot described in paragraph one hereof, and did then and there, while upon said lot, publicly, and in a loud and audible voice, demand payment of the sum of . . . dollars, the amount so assessed against said lot as aforesaid.

XXX. That thereafter, to-wit, on the . . . day of . . . , 19.., and within thirty (30) days of the date of said warrant, the said warrant was duly returned to said superintendent of streets, with a return indorsed thereon; and said return was signed by said . . . , as aforesaid, and was verified by him in the said city of . . . , upon his oath taken and sworn to before . . . , as city clerk of said city of . . . ; that said return stated whether any of said assessments remained unpaid in whole or in part, the amount thereof, and stated the nature and character of the demand as set forth above, and that said sum of money so assessed on said above-described lot remained unpaid though demand had been made therefor.

XXXI. That thereafter, on the . . . day of . . . , 19.., said superintendent of streets duly recorded the said return in the

margin of the said record of said warrant and assessment, and authenticated said record with his certificate of recordation, signed and subscribed by him in his own name; that at the same time and place said superintendent of streets likewise duly recorded the original contract referred to in his assessment, at full length, in a book kept by him for that purpose in his office, and authenticated said record of said contract with his certificate of recordation, signed and subscribed by himself in his name.

XXXII. That more than thirty-five (35) days have elapsed since the date of this warrant, and no person whatsoever has appealed to said board of trustees from or concerning any act of said contractor, or concerning said work, or from or concerning any act, proceeding, or determination of said superintendent of streets in relation to said work, contract, diagram, assessment, or warrant, or either or any of them, or concerning any other act, proceeding, or determination of said superintendent of streets whatever, or concerning any proceeding or proceedings prior to said assessment, or in the matter of, or relating to, said warrant, assessment, diagram, or work, and that no written or other objection to said acts or proceedings, or to either or any of them, or to any part thereof, has ever at any time been filed with the city clerk of said city of

XXXIII. That each and every act herein alleged to have been done or performed by the said superintendent of streets, and by the mayor and president of the board of trustees, and by the clerk of said city of . . . , was duly done and performed by the duly elected, qualified, and acting superintendent of streets, city clerk, and mayor and president of the board of trustees, respectively, of the said city of . . . , state of California, acting in his official capacity as such, and that each and every act, order, resolution, or determination hereinbefore alleged to have been given, made, done, or performed by the board of trustees of said city of . . . , was duly given, made, done, and performed by the duly elected, qualified, and acting board of trustees of the said city of . . . , state of California.

XXXIV. That all of the several acts and proceedings required to be done by said board of trustees, said superintendent of streets, said mayor and president of the board of trustees, said city clerk, and this plaintiff, have been duly done, made, and performed by it and them in the manner and at the time and in the form required by law, under the provisions of the act of the legis-

lature of the state of California, entitled "An act to provide for work upon streets, lanes, alleys, courts, places, and sidewalks, and for the construction of sewers within municipalities," approved March 18, 1885, and all acts amendatory and supplementary thereto, and in force at the time when said acts and proceedings of said board of trustees, superintendent of streets, mayor and president of the board of trustees, and plaintiff, were made, done, or performed.

XXXV. That said sum of . . . dollars, so assessed by said superintendent of streets upon said lot described in paragraph one hereof, has not been paid, nor has any part thereof, but, although demand for the payment of said sum has been made, as aforesaid, the whole thereof still remains and now is wholly due, owing, and unpaid, together with interest thereon at the rate of ten (10) per cent per annum from said . . . day of . . . , 19.., the date of said return of said warrant and assessment aforesaid.

Wherefore plaintiff prays:

1. For judgment for the sum of . . . dollars against said lot described in paragraph one of this complaint, together with interest thereon at the rate of ten (10) per cent per annum from said . . . day of . . . , 19.., until entry of judgment.

2. That said above-mentioned sum, with interest thereon to date of entry of judgment herein, together with the sum of fifteen (15) dollars attorneys' fees, be adjudged to be a lien upon said lot described in paragraph one of this complaint.

3. That a decree in due form be made for the sale of said lot by the sheriff of the said county of . . . , state of California, according to law and the practice of this court, and the proceeds of said sale be applied for the payment of the amounts so found due this plaintiff, together with attorneys' fees as herein prayed for, and for the costs of this suit.

4. That said defendants, and all persons claiming under them subsequent to the commencement of this action, either as purchasers, incumbrancers, or otherwise, be forever barred and foreclosed of all right, title, claim, or equity of redemption in and to the lot described in paragraph one of this complaint, and in and to each and every part thereof.

5. That plaintiff be allowed fifteen (15) dollars in addition to the taxable costs as attorneys' fees.

6. That plaintiff may have such other and further relief as to the court seems meet and proper.

CHAPTER CXLIII.

FORECLOSURE SALE UNDER TRUST-DEED.

§ 6107. **Trust, how created.**—As a rule, uses and trusts are those only that are created in accordance with statutory provisions, or by operation of law.¹ No trust in relation to real property is valid unless created or declared—1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing; 2. By the instrument under which the trustee claims the estate affected; or, 3. By operation of law.² If a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.³ But no implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust.⁴ The creation of a trust in real property by a simple verbal declaration of its owner is forbidden by the statute of frauds;⁵ and the court has no power to carve out an express trust based on parol.⁶ However, it is not absolutely void, only voidable at election of the trustee.⁷ When a trust is created by deed or will, language or rule of technical nature is not necessary.⁸ A letter recognizing a mistake of law and fact may be a sufficient writing;⁹ likewise, an absolute deed, executed in good faith for valuable consideration, whereby the grantee promises to pay a debt,¹⁰ or a deed to a partner of an embarrassed firm, to enable the mortgaging of the property to raise money to pay the firm debts.¹¹

1 Cal. Civ. Code, § 847.

2 Cal. Civ. Code, § 852.

3 Cal. Civ. Code, § 853.

4 Cal. Civ. Code, § 856.

5 *Sherman v. Sandell*, 106 Cal. 373, 39 Pac. 797.

6 *McCloud v. Hewlett*, 135 Cal. 361, 67 Pac. 333.

7 *Cooper v. Thomason*, 30 Or. 161, 45 Pac. 296; *Karr v. Washburn*, 56 Wis. 303, 14 N. W. 189.

8 *Estate of Reith*, 144 Cal. 314, 77 Pac. 942; *Colton v. Colton*, 127 U. S. 300, 32 L. Ed. 138, 8 Sup. Ct. 1164.

9 *Lynch v. Rooney*, 112 Cal. 279, 44 Pac. 565.

10 *Saunderson v. Broadwell*, 82 Cal. 132, 23 Pac. 36.

11 *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142.

§ 6108. **Payee as trustee.**—The property may be conveyed by deed of trust to the payee of the note for which it is given as security, and full power of sale vested in him, with the same effect as if a third party were made trustee.¹²

§ 6109. **Purposes of express trusts.**—Express trusts may be created for any of the following purposes: 1. To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust; 2. To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon; 3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of such trusts; or 4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the code provisions.¹³ The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.¹⁴ The author of the trust may transfer the property, subject to the execution of the trust.¹⁵

When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.¹⁶ The essential elements in trust under subdivision 1 of section 857 of the California code are an imperative duty to sell and equally imperative duty to apply or dispose of the proceeds in accordance with the instrument creating the trust.¹⁷ The intention of the parties must be ascertained from the instrument creating the trust; for the rights of the parties are fixed and controlled thereby.¹⁸

§ 6110. **Deed made absolute.**—If no defeasance has been recorded, the deed may be made absolute by a fair oral agreement of the parties, in which the grantee relinquishes to the grantor all the debt and evidence of the debt, and receives in return any writing in the nature of a defeasance.¹⁹ A quitclaim deed given

12 Roberts v. True, 7 Cal. App. 379, 94 Pac. 392.

13 Cal. Civ. Code, § 857.

14 Cal. Civ. Code, § 863.

15 Cal. Civ. Code, § 864.

16 Cal. Civ. Code, § 871.

17 Carpenter v. Cook, 132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997.

18 Tyler v. Granger, 48 Cal. 259.

19 Watson v. Edwards, 105 Cal. 70, 38 Pac. 527.

to the creditor and grantee in the deed of security, in order to surrender to such creditor any right of defeasance then in the grantor, and stating, after the general quitclaim clause, that it is given to surrender such title, conveys no other title.²⁰ There is no right to redeem from a sale by the trustee under a deed of trust.²¹

§ 6111. Deed as mortgage.—Notwithstanding the Civil Code provision, that a mortgage must be executed with certain formalities, a deed absolute in form given to secure a debt is a mortgage, and the facts attending its execution may be shown by parol evidence. If a debt was canceled by the deed, title passes; but if the debt is not extinguished, it is a mortgage, and must be foreclosed to pass title absolutely.²² It is not a conveyance, but only a security for debt, and title does not pass either before or after condition broken, except by deed or on foreclosure.²³ But the deed may be made absolute upon delivery by the grantee to the grantor of all claim and evidences of the debt secured, and a surrender to the grantee by the grantor of any defeasance given at time of or after giving the deed. But if such defeasance has been recorded, then a quitclaim deed should be had from the original grantor.²⁴ If a deed is executed as a substitute for an existing mortgage, under a mutual mistaken idea that no foreclosure will be necessary, it may be rescinded, by reason of such mistake, under sections 1566 and 1578 of the California Civil Code; but if it is not so rescinded, an agreement that the deed shall be returned on the payment of a debt is binding as a mortgage.²⁵ But if one takes a deed to certain property in payment of an existing debt, with the written agreement, however, to reconvey if within three years such debt and accrued interest and costs be paid up, it amounts to a conditional sale of the property in consideration of the debt, and the grantor cannot after six years, and after the grantee has made improvements thereon, come in and redeem the property.²⁶ The burden of proof is upon the one who claims the deed to be a mort-

²⁰ Allen v. Hall, 31 Colo. 206, 73 Pac. 844.

²¹ Roberts v. True, 7 Cal. App. 379, 94 Pac. 392.

²² Woodworth v. Guzman, 1 Cal. 203; Ahern v. McCarty, 107 Cal. 382, 40 Pac. 482.

²³ Guy v. Ide, 6 Cal. 99, 65 Am. Dec. 490.

²⁴ Watson v. Edwards, 105 Cal. 70, 38 Pac. 527.

²⁵ Kyle v. Hamilton, 136 Cal. xix, 68 Pac. 484; Grogan v. Valley Trading Co., 30 Mont. 229, 76 Pac. 211.

²⁶ Dabney v. Smith, 38 Wash. 40, 80 Pac. 199.

gage,²⁷ but this may be shown by parol evidence.²⁸ Such proof should be clear and satisfactory.²⁹

§ 6112. No limitations.—There is no limitation on the time for commencing a proceeding by a trustee to foreclose a trust-deed by advertisement and sale, and the beneficiary in the deed may demand foreclosure after default.³⁰

§ 6113. Defeasance.—A deed and a defeasance are to be read as one instrument.³¹ A defeasance may be executed at or after the time of the execution of the deed, provided it was executed according to an understanding had when the deed was executed.³² If the understanding was not in writing, but was put in writing some time after, it will suffice.³³

The difference between an absolute deed and a mortgage consists in the defeasance, which is an essential part of the latter. Whatever may be the effect of a parol defeasance in equity, it is clear that it cannot at law operate as a defeasance of a deed of conveyance.³⁴ In a bill in equity that avers a deed to have been a mortgage, it is not necessary to add that it became so by a defeasance, in order to let in proof of a defeasance.³⁵ Where A. gave to B. a deed of bargain and sale absolute on its face, and, as a part of the same transaction, B. executed and delivered to A. an instrument in writing, in which he stated that the land had been deeded to him as security for the payment of a promissory note, and the instrument recited that moneys received from the sales of the land should be credited on said note, and that when the note was fully paid by the proceeds from the sales of the land, or otherwise, that B. should redeed to A. all the lands first deeded

²⁷ *Bryant v. Broadwell*, 140 Cal. 490, 74 Pac. 33.

²⁸ *Borrow v. Borrow*, 34 Wash. 684, 76 Pac. 305; *Yingling v. Redwine*, 12 Okla. 64, 69 Pac. 810; *Ross v. Howard*, 31 Wash. 393, 72 Pac. 74; *Banta v. Wise*, 135 Cal. 277, 67 Pac. 129; *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28.

²⁹ *Emery v. Lowe*, 140 Cal. 379, 73 Pac. 981.

³⁰ *Foot v. Burr*, 41 Colo. 192, 92 Pac. 236, 13 L. R. A. (N. S.) 1210; *Roberts v. True*, 7 Cal. App. 379, 94 Pac. 392.

³¹ *Patterson v. Donner*, 48 Cal. 369.

³² *Sears v. Dixon*, 33 Cal. 326.

³³ *Adams v. Lambard*, 80 Cal. 426, 22 Pac. 180.

³⁴ *Flagg v. Mann*, 14 Pick. 467; *Seituate v. Inhabitants of Hanover*, 16 Pick. 222; *Flint v. Sheldon*, 13 Mass. 443, 7 Am. Dec. 162; *Eaton v. Green*, 22 Pick. 526; 1 Washburn on Real Property, 480. See Cal. Civ. Code, § 2925.

³⁵ *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1331.

to him, excepting such as may be sold, such a transaction is not intended as a mortgage merely. The instrument relied on as a defeasance amounts to a declaration of trust, and shows the intention to vest the title in B. to enable him to sell and convey the lands.³⁶

To convert a deed absolute in form into a mortgage, the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage; otherwise, the intention appearing on the face of the deed will prevail.³⁷ The test is whether, notwithstanding the conveyance, there is a subsisting continuing debt from the grantor to the grantee.³⁸ If it is given as a security for an indebtedness, a court of equity will declare it to be a mortgage, and allow the grantor to redeem, both as against the original grantee and parties who purchase from him with knowledge.³⁹

§ 6114. Subsequent purchaser for value without notice.—A grantee, for a valuable consideration and without notice either actual or constructive, of a grantee who at the time he got a deed executed a defeasance, takes the land free of the defeasance.⁴⁰ No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property for value and without notice of the trust.⁴¹

§ 6115. Right to foreclose.—A creditor is not required to wait until the notes he indorsed are all paid by the makers or by himself before he can proceed to realize upon the security he holds to protect him in such indorsements.⁴² A note for one year providing that if not paid it shall be renewed from year to year at the option of the holder, and a trust-deed being given as security, the trustee, by advertising and selling the property three years and sixteen days after date of the note, treats the note as due, and the sale is not premature.⁴³

Where a grantor and grantee stand in fiduciary relations to each other, a deed executed without consideration other than the

³⁶ *Vance v. Lincoln*, 38 Cal. 586.

³⁷ *Henley v. Hotaling*, 41 Cal. 22.
See *Rogers v. Jones*, 92 Cal. 80, 28
Pac. 97; *Husheon v. Husheon*, 71 Cal.
407, 12 Pac. 410.

³⁸ *Farmer v. Grose*, 42 Cal. 169.

³⁹ *Kuhn v. Rumpff*, 46 Cal. 299.

⁴⁰ Cal. Civ. Code, § 869; *Patterson v. Donner*, 48 Cal. 369.

⁴¹ Cal. Civ. Code, § 856.

⁴² *Meetz v. Mohr*, 141 Cal. 667, 75
Pac. 298.

⁴³ *Sacramento Bank v. Copsey*, 133
Cal. 663, 66 Pac. 8, 205.

oral promise, express or implied, of the grantee to hold the land for the purpose of carrying out an express trust in favor of the grantor, may be declared void, and the land be decreed to belong to the grantor, notwithstanding the execution of the deed. It is a constructive fraud, and makes the grantee an involuntary trustee.⁴⁴

§ 6116. **Strict foreclosure.**—The remedy of strict foreclosure being a harsh one, courts of equity will decree it only under peculiar and special circumstances.⁴⁵ It will not be made in the case of a conveyance of land absolute in form, intended as a mortgage to secure a loan, with or without a foreclosure.⁴⁶ The lien resulting from a mortgage is not subject to a strict foreclosure.⁴⁷

§ 6117. **Trustee's power of sale.**—Where a power to sell real property is given to a mortgagee or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded.⁴⁸ If a power is vested in several persons, all must unite in its execution; but in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.⁴⁹ Every transfer or other act of the trustee, in contravention of the trust, as specified in the instrument of its creation, is absolutely void.⁵⁰

Where the trustee authorized by a deed to sell land proceeds to sell thereunder, it constitutes an acceptance of the trust, and this though the trustee be the payee of the note secured, and has commenced an action alleging the deed to be a mortgage, and in such action has alleged a non-acceptance of the trust. He afterwards accepts the trust by proceeding to sell under it.⁵¹

44 *Feeney v. Howard*, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; *Brison v. Brison*, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; *Alaniz v. Casenave*, 91 Cal. 41, 27 Pac. 521; *Hayne v. Hermann*, 97 Cal. 262, 32 Pac. 171; *Jones v. Jones*, 140 Cal. 590, 74 Pac. 143.

45 *Flanagan's Estate v. Great Cen. Land Co.*, 45 Or. 335, 77 Pac. 485.

46 *McCaughy v. McDuffie*, 141 Cal. xviii, 74 Pac. 751.

47 *Blood v. Shepard*, 69 Kan. 752, 77 Pac. 565.

48 Cal. Civ. Code, § 853.

49 Cal. Civ. Code, § 860.

50 Cal. Civ. Code, § 870.

51 *Mayhall v. Eppinger*, 137 Cal. 5, 69 Pac. 489.

§ 6118. **To sell and dispose of.**—Trusts for the purpose of sale must be imperative, and not merely discretionary.⁵² A deed executed to secure payment of a debt, evidenced by notes or not, may give a power of sale to the trustee, in case of default, and to execute to the purchaser a good and sufficient deed, and apply the proceeds in satisfaction of the debt and expenses of sale. Such a deed is not a mortgage requiring judicial foreclosure and sale in order to vest title in the purchaser.⁵³ But a power in trust to convey has no application in California, and the reason is an intent to avoid the intricacies, frauds, and concealments which were possible under the old system of trusts and uses.⁵⁴ A trust to hold property is not a trust to sell and dispose of the proceeds.⁵⁵ A trust under a deed of assignment for the benefit of creditors, with power to sell and apply the proceeds to the payment of the debts, and to pay over the surplus to the debtor, continues while the debt subsists.⁵⁶

Under a deed executed by a grantor to a trustee, with power to sell at the end of a limited period, but reserving the right in the grantor to sell or mortgage for the purposes of the trust before absolute sale and conveyance by the trustee pursuant to such deed, the relation existing between the grantor or his assigns and the trustee is similar to that of a mortgagor or his assigns and a mortgagee with absolute power of sale, and passes no right, legal or equitable, to beneficial sale or possession to the trustee as trustee.⁵⁷

§ 6119. **Revocation of power to sell.**—A trust-deed given as security for a debt, and containing a stipulation authorizing the trustee to sell the property after default, authorizes the trustee to exercise the power after the grantor's death; being a power coupled with an interest, it is not revoked by the grantor's death, and the sale may be made without reference to the administration of the grantor's estate.⁵⁸ The power is a part of the security, and vests in the assignee upon assignment, who may execute the

52 *Morffew v. San Francisco etc. R. Co.*, 107 Cal. 587, 40 Pac. 810; *Kidwell v. Brummagim*, 32 Cal. 436.

53 *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Bateman v. Burr*, 57 Cal. 480.

54 *Estate of Fair*, 132 Cal. 523, 84 Am. St. Rep. 70, 60 Pac. 442, 64 Pac.

1000; *McCurdy v. Otto*, 140 Cal. 48, 73 Pac. 784.

55 *Carpenter v. Cook*, 132 Cal. 621, 84 Am. St. Rep. 118, 64 Pac. 997.

56 *Handley v. Pfister*, 39 Cal. 283, 2 Am. Rep. 449.

57 *Tyler v. Granger*, 48 Cal. 259.

58 *Muth v. Goddard*, 28 Mont.

same when the assignment is duly acknowledged and recorded, and in absence of such recording may demand the sale.⁵⁹

§ 6120. **Restraining exercise of power.**—The pendency of an action in foreclosure on a trust-deed, which action waives the trust and treats it as a mortgage, is not sufficient ground for the enjoining of a sale under the trust-deed, the trustee, also the payee of the note, having decided to assume the trust and sell thereunder in place of treating it as a mortgage.⁶⁰ If the exercise of the trust power is premature, it may be enjoined, but not on the pleadings, if it is alleged that the defendants duly performed all the requirements of the deed and the agreement on their part to be performed.⁶¹

§ 6121. **Duty of trustee—Notice of sale.**—The trustee in a trust-deed is under no duty, when a sale is contemplated, to make any other effort to procure bidders than to advertise the sale in the manner provided in the deed of trust. He may employ an auctioneer to cry the sale.⁶²

§ 6122. **Who may purchase at trustee's sale.**—A sale by trustees in a deed of trust to the corporation holder of the note secured is not void merely because the trustees are stockholders and directors in the corporation, the deed expressly authorizing a holder of the note to purchase.⁶³ And even if the deed did not authorize a sale to the holder of the note, such a sale would not be void, but voidable, and, at any rate, a corporation occupies no fiduciary relation through the fact that a part of its stockholders or directors are trustees named in a deed of trust.⁶⁴ But a trustee who subsequently acquires the note, and assigns it to his wife, who then requests a sale under the deed of trust to a newly formed corporation, of which the trustee is president, is too much interested in the sale of the property to make it a valid sale.⁶⁵

237, 98 Am. St. Rep. 553, 72 Pac. 621.

⁵⁹ Cal. Civ. Code, § 858; Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

⁶⁰ Mayhall v. Eppinger, 137 Cal. 5, 69 Pac. 489.

⁶¹ Meetz v. Mohr, 141 Cal. 667, 75 Pac. 298.

⁶² Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

⁶³ Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 Pac. 745.

⁶⁴ Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 233, 66 Pac. 7.

⁶⁵ Smith v. Downey, 38 Colo. 165, 88 Pac. 159.

The trustee himself, at the instance of the beneficiary, may make a bid on the property without impairing the sale.⁶⁶

§ 6123. **Title of purchaser.**—The trustee's deed vests the title held by the trustor at date of the deed of trust in the purchaser at the trustee's sale.⁶⁷ A sale under a trust-deed terminates any easements granted subsequent to the execution and recordation of the deed of trust.⁶⁸

§ 6124. **Setting aside sale.**—If stockholders of a bank are trustees, and sell under a trust-deed to the bank, the sale will not be disturbed in absence of an allegation of inadequate consideration.⁶⁹ The *cestui que trust* may bring an action to foreclose on the notes, and have the deed made by the trustee set aside on the ground that no application was ever made to the trustee to have the property sold; but if the trust-deed provides that the recitals in the trustee's deed shall be *prima facie* evidence of the facts therein stated, the burden of proof is upon him to disprove the statement in the trustee's deed that such application was made.⁷⁰ The widow of a trustor may have the property other than the homestead sold first, and upon failure to comply with her demand may have the sale set aside.⁷¹ An offer to pay made after sale, and before execution of the trustee's deed, does not affect the validity of the sale, nor vest in the maker the right to a reconveyance.⁷² Mere inadequacy of price will not void the sale.⁷³ If the sale is voidable because the homestead was not reserved from sale till the last, such right must be set up in defense in a suit for possession of the premises, or it cannot afterwards be used in a separate action, unless the purchaser had notice of the demand that the homestead property be reserved.⁷⁴

§ 6125. **Surplus and personal liability.**—If a trust-deed expressly provides that it shall not be necessary for one purchasing

66 Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

67 Stockton Sav. etc. Soc. v. Saddle-mire, 3 Cal. App. 525, 86 Pac. 723.

68 Burlington etc. R. R. Co. v. Colorado Eastern Ry., 38 Colo. 95, 88 Pac. 154.

69 Copsey v. Sacramento Bank, 133 Cal. 659, 85 Am. St. Rep. 238, 66 Pac. 7.

70 Mosca Milling etc. Co. v. Murto, 18 Colo. App. 437, 72 Pac. 287.

71 Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706.

72 Stockwell v. Barnum, 7 Cal. App. 413, 94 Pac. 400.

73 Id.

74 Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706.

from the trustee to see to the application of the purchase money, a purchaser is relieved from responsibility by a payment to the trustee, and is not bound to know that it is applied to payment of the notes secured by the trust-deed.⁷⁵ Auctioneer fees and attorney fees being provided for in the deed of trust, they may, if paid, be properly retained by the trustee.⁷⁶

After a sale under a trust-deed securing a note, an action may be maintained for any unsatisfied balance; but the security must first be exhausted before such an action can be brought to secure a personal judgment.⁷⁷

⁷⁵ Mosca Milling etc. Co. v. Murto,
18 Colo. App. 437, 72 Pac. 287.

⁷⁶ Continental Bldg. & Loan Assoc.

v. Light, 6 Cal. App. 684, 92 Pac. 1034.

⁷⁷ Herbert Kraft Co. v. Bryan, 140

Cal. 73, 73 Pac. 745, also 68 Pac. 1020.

CHAPTER CXLIV.

PARTITION.

§ 6126. **Actions of partition.**—The proceeding in partition is a special proceeding prescribed by the statute, and though errors in the course of the cause cannot be collaterally shown, yet so far as the rights of infants are involved the court has no jurisdiction, except over the matter of the partition.¹ The object of the suit is to enable each party to obtain the title, and the use for all future time in severalty, of some definite portion of the property owned in common.² And when parties go into partition upon certain terms and conditions, the instrument of partition founded on certain releases is itself an affirmation of title and interest so as to estop a party thereto from subsequently denying interest and ownership in the property.³ The intention of the action of partition is to make one judgment in partition final and conclusive on all persons interested in the property or any part of it. Such actions partake more of the principles of equity than of law.⁴ If between the parties to an action for partition disputes exist as to their rights or interests in any respect, such disputes may be litigated and determined.⁵

§ 6127. **Civil or equitable action.**—The Wyoming statutory action for partition,^{5a} prescribing the procedure and the distinction between actions at law and suits in equity, and their forms being abolished, thereby makes the partition suit a civil action.⁶ The methods employed by the California Code of Civil Procedure in an action for partition are, in the main, but a reflex of those pursued under the former equity practice, and the equities of the respective parties growing out of their ownership in the property,

1 *Waterman v. Lawrence*, 19 Cal. 210, 79 Am. Dec. 212.

2 *McGillivray v. Evans*, 27 Cal. 92.

3 *Tewksbury v. Provizzo*, 12 Cal. 20.

4 *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356.

5 *Morenhout v. Higuera*, 32 Cal. 289.

5a Wyo. Rev. Stats., § 4080; Wyo. Civ. Code, § 3443.

6 *Field v. Leiter*, 16 Wyo. 1, 125 Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622.

as tenants in common or otherwise, are taken into consideration and disposed of upon the broad principles which should govern courts of equity in the administration of justice.⁷

§ 6128. **Jurisdiction.**—An action for partition of several distinct tracts of land situate in different counties may be brought in the superior court of any one of such counties.⁸ Partition of the land sought to be divided may be made, though the same parties own other land jointly.⁹

§ 6129. **When action will lie.**—The action may be brought for a partition by one or more, according to the respective rights of the persons interested, and for a sale of the property, or a part thereof, if it appear that a partition cannot be made without great prejudice to the owners.¹⁰ Action for partition may be had on termination of a trust by payment of the mortgage for the giving of which the trust was created, though there may be other joint debts of the co-owners.¹¹ A mere desire of one of the tenants in common is sufficient to authorize the courts to dissolve the relations existing between them.¹²

§ 6130. **When action will not lie.**—A petition for partition against an executor for a filial portion, etc., will not lie for money or other property delivered by him to a legatee for life.¹³ Where a tenant in common ousts his cotenant, remaining in sole possession, and subsequently purchases an outstanding title, the cotenant cannot maintain an action for partition or for the benefit of the purchaser until he has regained possession.¹⁴

§ 6131. **Limitations.**—In an action in partition brought for the benefit of all persons interested in the estate, all are actors from its commencement, and limitations do not run as to any of them

7 Jameson v. Hayward, 106 Cal. 682, 46 Am. St. Rep. 268, 39 Pac. 1078. See Dall v. Confidence etc. Min. Co., 3 Nev. 535, 93 Am. Dec. 419; Holloway v. Holloway, 97 Mo. 628, 10 Am. St. Rep. 339, 11 S. W. 233; Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778, 8 South. 715.

8 Murphy v. Superior Court, 138 Cal. 69, 70 Pac. 1070.

9 Field v. Leiter, 16 Wyo. 1, 125

Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622.

10 Cal. Code Civ. Proc., § 752. See Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778, 8 South. 715.

11 Gardiner v. Cord, 145 Cal. 157, 78 Pac. 544.

12 Bradley v. Harkness, 26 Cal. 69.

13 Billups v. Riddick, 8 Jones L. (N. C.) 163.

14 Rozier v. Johnson, 35 Mo. 326.

thereafter. The statute of limitations bars partition only where the land sought to be divided has by prescription become vested in another.¹⁵ The divorce decree having made no disposition of the community property, even after thirteen years, the wife may have a partition of such property, though it has remained in the possession of the husband.¹⁶

§ 6132. **Partition by deed.**—Where a deed of partition is invalid as a conveyance, by reason of its non-execution by some of those who are parties to it, it may become effectual by the parties taking and holding in severalty in pursuance of its terms, and dealing with their respective parts as if owned in severalty; but such acts of ratification do not operate to make the deed a valid conveyance, but only by way of estoppel or as a determination of boundaries, and only upon the interests of those performing them. A party who signed the deed is not estopped from insisting upon its invalidity by reason of any acts of ratification, either of the others who did execute or of those who failed to execute.¹⁷ A contract between A. and B., tenants in common, by which it is agreed that B.'s interest in the land shall be a certain amount in excess of what he otherwise owned, and that B. shall extinguish all claim of title in the land set up by C., by procuring C.'s deed, and that after certain other events transpire a division of the land shall take place between the contracting parties, and deeds be exchanged, is not fulfilled by B. having procured C.'s deed before the contract was made, nor by procuring C.'s deed to himself, unless he then conveys it to A., even though C. had no valid title to the land.¹⁸ A conveyance by one tenant in common, or any number less than the whole, of a specific portion of the common lands, is not void, but cannot be made to the prejudice of the tenants not uniting in the conveyance.¹⁹

§ 6133. **Partition not presumed.**—A partition by judicial decree among tenants in common will not be presumed to have been made from lapse of time, occupancy in severalty, and the destruction of the records of a court which had jurisdiction to make such

¹⁵ Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

¹⁶ Graves v. Graves, 48 Wash. 664, 94 Pac. 481.

¹⁷ Tewksbury v. O'Connell, 21 Cal. 60.

¹⁸ Porter v. Atherton, 32 Cal. 416.

¹⁹ Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139.

partition, against a tenant who married while under age, and whose coverture continued until shortly before suit brought.²⁰

§ 6134. **Partition without action.**—Where a deed of partition, executed by a number of tenants in common, by the terms of which each party conveyed and released his undivided interest in the whole in consideration of the conveyance to him of the undivided interests of others to specified portions, if it was not executed by all, such deed was void as to those who did not sign.²¹ Such an agreement is void as to a purchaser of one of the tenants in common, the contract of sale being placed of record.²² But it may become effectual by the parties taking and holding in severalty under its terms.²³ The general guardian of an infant or insane person, or person incapable of conducting his own affairs, under proper authorization by the court having jurisdiction of the ward's estate, may agree to partition with or without action.²⁴

§ 6135. **Referee.**—The court may appoint a referee to ascertain whether liens or incumbrances have been paid, or what amount remains due thereon, or whether the amounts due have been secured, and the nature and extent of the security, or may order such lienholders to be made parties by amended or supplemental complaint.²⁵ And notice of such hearing before the referee shall be served upon such lienholders. The effect of a judgment in partition is to be determined by statute, and not by the common law.²⁶ With the consent of the parties, the court may appoint a single referee to make partition, instead of three.²⁷ If only one referee is appointed in a partition suit, such proceeding is only an irregularity, and cannot be inquired into collaterally.²⁸

§ 6136. **Rents and profits.**—One tenant in common out of possession may, in equity, as a collateral incident to a claim for par-

²⁰ Den ex dem. Weatherhead v. Baskerville, 11 How. 330, 13 L. Ed. 717.

²¹ Tewksbury v. O'Connell, 21 Cal. 60.

²² Peterson v. Sloss, 39 Wash. 207, 81 Pac. 744.

²³ Tewksbury v. O'Connell, 21 Cal. 60.

²⁴ Cal. Code Civ. Proc., § 1772. See, also, § 1722.

²⁵ Cal. Code Civ. Proc., § 761.

²⁶ Cal. Code Civ. Proc., § 762. Consult Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212; Hathaway v. De Soto, 21 Cal. 191; Morenhout v. Higuera, 32 Cal. 289; Sutter v. City etc. San Francisco, 36 Cal. 112.

²⁷ Cal. Code Civ. Proc., § 763.

²⁸ Morrill v. Morrill, 20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155.

tition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises.²⁹ If one of several tenants in common lease a portion of the common property to a tenant, and, after the lease is made, suit for partition is commenced, and a decree entered which assigns to another of the tenants in common the land so leased, the decree does not pass to the latter the rent of the leased land, unless such rent falls due after the decree is made.³⁰

§ 6137. **Improvements.**—Improvements made by one of the tenants, unless essential to the preservation of the property, should be considered, and an allowance made therefor, if it can be done without prejudice to the interests of the other parties; but this rule does not apply unless it is shown that such cotenant actually made such improvements, or became legally obligated to pay for them.³¹ Where husband and wife occupy his land and improve it, she is entitled to an allowance for her share of the improvement before it is divided between herself and other heirs of the husband.³²

§ 6138. **Land formed by accretion.**—In apportioning to proprietors their respective shares of an alluvial accretion, the whole length along the shore of the alluvion shall be first found, and it shall then be divided among the proprietors of the upland in proportion to their shore-line.³³

§ 6139. **Legacies.**—Any heir, devisee, or legatee, after the lapse of four months after issuance of letters in the estate, may petition the court to have the legacy or share of the estate given to him on his giving bonds for his proportion of the debts of the estate.³⁴ But if the will directs that the property be sold upon the death of the widow and be distributed, the heirs are not entitled to maintain an action for partition.³⁵

²⁹ Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540.

³⁰ Mahoney v. Alviso, 51 Cal. 440; Mahoney v. Aurrecochea, 51 Cal. 429.

³¹ Pesqueira v. Kellogg, 8 Ariz. 266, 71 Pac. 915.

³² Legg v. Legg, 34 Wash. 132, 75 Pac. 130.

³³ Jones v. Johnston, 18 How. 150, 15 L. Ed. 320.

³⁴ Cal. Code Civ. Proc., § 1658. As to the proceedings thereon, consult Cal. Code Civ. Proc., §§ 1658-1662.

³⁵ Bank of Ukiah v. Rice, 143 Cal. 265, 101 Am. St. Rep. 118, 76 Pac. 1020.

§ 6140. **Lienholders.**—No person having a conveyance of or claiming a lien on the property, or some part of it, need be made a party to the action, unless such conveyance or lien appear of record.³⁶ A judgment creditor of a deceased person is not entitled to be made a party to a partition suit.³⁷ But the complaint may state that one of the defendants claims a specific lien on the premises, and asks for an accounting.³⁸ Where there are outstanding liens or incumbrances of record upon such real property, or any portion thereof, existing at the commencement of the action, the persons holding such liens may be made parties to the action.³⁹

§ 6141. **Married woman.**—A married woman whose husband is sued in partition is a necessary party, if she claims a homestead right to or an interest in the property in dispute.⁴⁰ A wife should be co-plaintiff with her husband in such actions.⁴¹ But a widow, though a proper, is not a necessary, party. And a judgment which makes not a sale, but actual partition, in no way affects her interests, and should not be disturbed upon her motion to set aside for irregularity.⁴² Under the direct provisions of the Montana code, the wife of defendant, having an inchoate right of dower in an undivided share of the property, must be made a party to the action for partition.⁴³ The wife is entitled to a credit for the betterments she and her husband put upon his land during coverture up to the time of his death, before it is divided between her and other heirs.⁴⁴

§ 6142. **Mining claim.**—The mere fact that a mining claim is owned and worked by several persons as partners is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership; and all the material allegations in a complaint for

³⁶ Cal. Code Civ. Proc., § 754.

³⁷ *Waring v. Waring*, 3 Abb. Pr. 246.

³⁸ *Bogardus v. Parker*, 7 How. Pr. 305.

³⁹ Cal. Code Civ. Proc., § 761.

⁴⁰ *De Uprey v. De Uprey*, 27 Cal. 331, 87 Am. Dec. 81.

⁴¹ *Ripple v. Gilborn*, 8 How. Pr. 456; *Brownson v. Gifford*, 8 How. Pr. 389.

⁴² *Gordon v. Sterling*, 13 How. Pr. 405. See *Ash v. Cook*, 3 Abb. Pr. 389; *Tanner v. Niles*, 1 Barb. 560. Compare *Ripple v. Gilborn*, 8 How. Pr. 456.

⁴³ Mont. Rev. Codes, § 6885; *Hurley v. O'Neill*, 31 Mont. 595, 79 Pac. 242.

⁴⁴ *Legg v. Legg*, 34 Wash. 132, 75 Pac. 130.

partition of real property which are not denied by the answer are deemed admitted for the purpose of the trial.⁴⁵ Where two thirds of a quartz-mill and mine were owned by M. and S., while the other third was owned by C. and Y., and the profits and losses of the entire claim were shared in this proportion, M. and S. conveyed by deed their interest to R., who entered into and remained in possession of the same, a small portion only of the purchase money being paid down by R. After this conveyance a suit was instituted against M., S., C., and Y. for a debt due by the company, contracted before the conveyance, and judgment was passed against them, and all their right, title, and interest were sold to H., who in due course received a sheriff's deed, under and by virtue of which he thereafter claimed to own all said property. In an action by R. against H. to quiet title, it was held that R. acquired under said deed from M. and S. the title to the two-thirds undivided interest, and H. acquired by said sheriff's deed only the one-third undivided interest of C. and Y.⁴⁶ But a grant of an undivided third-interest in a piece of mining ground, together with the water-rights, reservoirs, and tail-races belonging to the same, expressly conditioned that such grant should convey no other rights to the grantee except a mining right, does not make the grantee a coparcener, joint tenant, or tenant in common with the grantor. It simply conveys to him a right to enter upon and occupy the land for the purpose of working it, either by underground excavations or open workings. Such right is not capable of partition.⁴⁷ -

§ 6143. *Mortgage*.—It is not sufficient to aver merely that the defendant claims an interest adverse to the plaintiff, but the nature of the claim should be set out.⁴⁸ The plaintiff cannot foreclose a mortgage which he holds on defendant's interest in the property, and cut off defendant's equity of redemption by an absolute sale, as in partition.⁴⁹

§ 6144. *Parol partition—Mexican grant*.—A parol partition of land may be made by co-owners under the Mexican law as well as

⁴⁵ *Hughes v. Devlin*, 23 Cal. 501.

⁴⁶ *Ross v. Heintzen*, 36 Cal. 313.

⁴⁷ *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880.

⁴⁸ *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116.

⁴⁹ *Bradley v. Harkness*, 26 Cal. 76; *Towle Bros. Co. v. Quinn*, 141 Cal. 382, 74 Pac. 1046.

by tenants in common under the common law.⁵⁰ In order to uphold a parol partition under both the Spanish and common law, it must satisfactorily appear that there was not only an agreement to make the partition, but that the same was fully executed and followed up by a several possession by either the parties themselves or their grantees.⁵¹ An agreement to establish a partition line between the occupants of adjoining tracts of land is of no validity. In order to render such agreement for a partition line effectual, each party must have the title to and right to dispose of the tract claimed by him; or, in other words, they must be coterminous proprietors.⁵² A parol partition of land owned by tenants in common could be made in California before the adoption of the common law; but the agreement for such partition should be satisfactorily proved, and each tenant in common should have assigned to him and enter upon and possess a specific part of the land in severalty.⁵³

§ 6145. **Partial partition.**—When in the opinion of the court a complete partition would be impracticable or inconvenient, a partial partition may be made.⁵⁴ The court may direct a partition among two or more, and from time to time determine as to the others' rights, shares, and interests, and render a further judgment directing a partition in like manner of the undetermined parts of the property.⁵⁵ Where the commissioners in the partition and allotment failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide it, or that the allotments made would in any degree have been affected by the allotment of this, or that any injury resulted to any one interested in consequence of this omission, and where important rights have vested under the partition, this court would not be warranted in holding the action of the commissioners void because of their failure to divide and allot the marsh land.⁵⁶

⁵⁰ Long v. Dollarhide, 24 Cal. 218.

⁵¹ Id.

⁵² Carpentier v. Thirston, 24 Cal. 280.

⁵³ Elias v. Verdugo, 27 Cal. 420. See, also, Long v. Dollarhide, 24 Cal. 218; Tuffree v. Polhemus, 108 Cal. 670, 41 Pac. 806; Simmons v. Spratt,

26 Fla. 462, 8 South. 123, 9 L. R. A. 343; Brazee v. Schofield, 2 Wash. T. 209, 3 Pac. 265, 124 U. S. 495, 31 L. Ed. 484, 8 Sup. Ct. 604.

⁵⁴ See Cal. Code Civ. Proc., § 760.

⁵⁵ Richardson v. Ruddy, 10 Idaho, 151, 77 Pac. 972.

⁵⁶ Tewksbury v. Provizzo, 12 Cal. 20.

§ 6146. **Mexican grant.**—Nothing in the law requires the whole of a Mexican grant to be included in a partition suit, under section 752 of the California Code of Civil Procedure.⁵⁷

§ 6147. **Remainder.**—Where it is uncertain to whom and in what proportions a remainder may descend after the termination of a life estate, a judgment in partition made before the life estate terminates should not ascertain the interest of those holding in remainder, but should allot the life estate subject to the remainder.⁵⁸

§ 6148. **Rule in respect to improvements.**—In an action for partition by one tenant in common, of lands granted to cotenants, where the tenants have severally made valuable improvements on distinct portions of the land sought to be partitioned, the court, by way of interlocutory decree, may order that there be set off to the several parties such portions of the premises as will include their respective improvements, provided that the rights or interest of none of the other parties be prejudiced thereby.⁵⁹

§ 6149. **Specific tract.**—Where one or more of the tenants in common have sold and conveyed to another a specific tract by metes and bounds out of the common land, the land described in such deed shall be set aside to the purchaser, if it can be done without material injury to the rights and interests of the other cotenants.⁶⁰

§ 6150. **Summons.**—The summons must contain a description of the property sought to be partitioned, and must be directed to all the persons named as defendants in the complaint, and when it shows an unknown claimant, it must also be directed to all persons unknown who have or claim any interest in or lien upon the property.⁶¹ And if issued within the year from the date of filing the complaint, it is in sufficient time.⁶² And unknown parties or absentees from the state may be served by publication, upon affidavit showing such facts, the summons in such case to be accompanied by a brief description of the property.⁶³

⁵⁷ Adams v. Hopkins (Cal.), 69 Pac. 228.

⁵⁸ Regan v. McMahon, 41 Cal. 679.

⁵⁹ Seale v. Soto, 35 Cal. 102.

⁶⁰ Cal. Code Civ. Proc., § 764; Gates v. Salmon, 35 Cal. 576, 95 Am.

Dec. 139; Seale v. Soto, 35 Cal. 102.

⁶¹ Cal. Code Civ. Proc., § 756, as amended 1907.

⁶² Adams v. Hopkins (Cal.), 69 Pac. 228.

⁶³ Cal. Code Civ. Proc., § 757.

§ 6151. **Title.**—In the New York practice, it is not necessary to state the sources of title in the complaint.⁶⁴ But a complaint in an action for partition is fatally defective if it shows that the legal title is in a third person as trustee.⁶⁵ Title may be tried in this action.⁶⁶

§ 6152. **Water-rates.**—Water flowing in ditches cannot be partitioned. It may be sold, and the proceeds be subject to distribution.⁶⁷ The only partition that can be made is to order a sale and distribution of the proceeds. In an action for partition of a water-ditch, an account of the proceeds for water-rates can be taken, and if one of the tenants in common holds a mortgage on the interests of his cotenants, that can be adjusted in the action, by an application of the proceeds of the mortgagor's interest towards the payment of the same.⁶⁸

§ 6153. **Ways—Streets.**—Before making partition the referees may set apart a portion of the property for a way, road, or street, and such portion must not be assigned to any of the parties or sold, but must remain an open public way, road, or street, unless the referees shall set the same apart as a private way for the use of the parties interested, or some of them. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they must report that fact to the court, and upon the confirmation of their report all other roads on said tract cease to be public highways.⁶⁹

§ 6154. **Allegations essential.**—Under the New York practice, the complaint must show that the plaintiff is in possession, actual or constructive.⁷⁰ That plaintiff is possessed of an undisputed title to the undivided share in remainder, although there be an

⁶⁴ 2 Van Santv. Eq. Pr. 17; Bradshaw v. Callaghan, 8 Johns. 558.

⁶⁵ Stryker v. Lynch, 11 N. Y. Leg. Obs. 116.

⁶⁶ De Uprey v. De Uprey, 27 Cal. 329, 87 Am. Dec. 81; Morenhout v. Higuera, 32 Cal. 289; affirmed in Bollo v. Navarro, 33 Cal. 459. See Sutter v. San Francisco, 36 Cal. 112; Kromer v. Friday, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

⁶⁷ McGillivray v. Evans, 27 Cal. 96.

⁶⁸ Bradley v. Harkness, 26 Cal. 69. See Glassell v. Verdings, 108 Cal. 503, 41 Pac. 403.

⁶⁹ Cal. Code Civ. Proc., § 764.

⁷⁰ Stryker v. Lynch, 11 N. Y. Leg. Obs. 116. That it is so in Oregon, see Farris v. Hayes, 9 Or. 81; Windsor v. Simpkins, 19 Or. 117, 23 Pac. 669; Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795, 23 Pac. 890.

existing admitted life estate covering the whole premises, is a sufficient allegation of the right of possession.⁷¹ The allegation that the parties were seised in common raises the presumption of possession.⁷² And where a party was stated to be seised of a certain portion, it was construed to mean a seisin in fee.⁷³ The complaint must aver that the cotenants hold and are in possession of real property as parceners, joint tenants, or as tenants in common, in which property one or more of them have an estate of inheritance, or for life or lives, or for years.⁷⁴ If the complaint fails to sufficiently state the origin, nature, and extent of the interests of the plaintiffs, the objection should be presented by demurrer, or it is waived.⁷⁵ If defendant has two deeds, each purporting to convey a certain interest, and one of them was given as a substitute for the other, that fact must be averred, and if not averred, the plaintiff cannot prove it. All the rights of the several parties, plaintiff as well as defendant, must be put in issue, or they cannot be tried.⁷⁶ If expense has been necessarily incurred by the plaintiff or any of the tenants in common in prosecuting or defending actions or proceedings for the protection, confirmation, or perfecting of the title, setting the boundaries, making surveys, etc., such expense, except counsel fees, is allowed, with interest, but must be pleaded.⁷⁷

In a complaint to obtain partition of land, a general allegation that "the premises cannot be divided by metes and bounds without prejudice," is sufficient, without an allegation of the facts upon which the plaintiff relies to obtain a particular mode of partition. A complaint in partition is good which is silent upon the subject of the mode of partition.⁷⁸ If the court finds that the parties hold and are in possession of real property, as joint tenants or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, the partition should be made, although the findings may also show that the plaintiff, in his complaint, has incorrectly set forth the title or interest of the parties, or of one or more of them, in the land.⁷⁹ A

71 *Blakely v. Calder*, 13 How. Pr. 476.

72 *Jenkins v. Van Schaack*, 3 Paige, 242. See *Burhans v. Burhans*, 2 Barb. Ch. 398; *Balen v. Jacquelin*, 67 Hun, 311, 22 N. Y. Supp. 193.

73 *Lucet v. Beekman*, 2 Cal. 385.

74 *Bradley v. Harkness*, 26 Cal. 76;

Cal. Code Civ. Proc., § 752; *Sterling v. Sterling*, 43 Or. 200, 72 Pac. 741.

75 *Broad v. Broad*, 40 Cal. 495.

76 *Miller v. Sharp*, 48 Cal. 394.

77 See Cal. Code Civ. Proc., § 798.

78 *De Uprey v. De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

79 *Id.*

complaint in partition, which sets forth every particular required by the code chapter on partitions,⁸⁰ and sets out not only the interests of the original cotenants, but also the interests of the respective heirs of a deceased cotenant, is sufficient to give the court jurisdiction to make partition.⁸¹ So, in partition proceedings, allegations in the plaintiff's complaint showing the extent of his interest in the property, the extent of the defendant's interest as he understands it, and that plaintiff and defendant are tenants in common, are sufficient to give the court jurisdiction of the subject-matter, under the requirements of section 553 of the code of Washington, providing that "the interest of all persons in the property shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff."⁸²

The California decisions have gone to great length in upholding the right of a tenant in common to maintain the action for a partition where he had a right to the present possession, although not in actual possession.⁸³ The complaint should allege possession of the premises.⁸⁴ In this action the parties may assert any title that they have, legal or equitable.⁸⁵ Under the Washington code, a suit for partition of lands may be maintained by a tenant in common against those in possession under an adverse claim of title without the institution of a prior action at law for the trial of title.⁸⁶

§ 6155. Petition or complaint.—The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint, as far as known to the plaintiff; and the fact that a party interested is unknown to plaintiff, or that the quantity of an interest is unknown, or that an interest is uncertain or contingent, or depends upon an executory devise, must all be set forth in the complaint.⁸⁷ Water-rights running with the land need not be enumerated as part of the property to be par-

⁸⁰ Cal. Code Civ. Proc., pt. 2, tit. 10, ch. 4.

⁸¹ *Richardson v. Loupe*, 80 Cal. 490, 22 Pac. 227.

⁸² *Kromer v. Friday*, 10 Wash. 221, 39 Pac. 229, 32 L. R. A. 671.

⁸³ See *Martin v. Walker*, 58 Cal. 590; *Hancock v. Lopez*, 53 Cal. 371; *Jameson v. Hayward*, 106 Cal. 687, 46 Am. St. Rep. 268.

⁸⁴ *Sterling v. Sterling*, 43 Or. 200, 72 Pac. 742.

⁸⁵ *Watson v. Sutro*, 86 Cal. 527, 24 Pac. 172, 25 Pac. 64; *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082.

⁸⁶ *Hill v. Young*, 7 Wash. 33, 34 Pac. 144.

⁸⁷ Cal. Code Civ. Proc., § 753, as amended 1907; *Mont. Rev. Codes*, § 6887.

tioned.⁸⁸ A description of the premises as the "westerly one half of" a specified lot and block, etc., is sufficient.⁸⁹

§ 6156. **Questions of fact.**—When questions of fact are to be tried in partition suits, it can only be done on regular issues joined. And the allegations and proofs must agree in this class of suits, the same as in others.⁹⁰

§ 6157. **Community property.**—Where a community was formed making a common stock of property, and renouncing individual ownership, and became incorporated, the individual members of the community, or the heirs upon their death, were not entitled to a partition of the property.⁹¹ A sale of land by virtue of a partition proceeding brought by the purchaser of a wife's community half-interest, is not subject to a deceased husband's will providing for the retention of the land until his children arrive at majority.⁹²

§ 6158. **Deed obtained by fraud.**—The question whether a deed was obtained by fraud cannot be considered in proceedings for partition; it must be sent to a court of law for trial.⁹³

In one case plaintiff sued defendant for partition. The court ordered a sale of the property and distribution of the proceeds. After the sale, G. filed a petition, stating that he was the creditor of one F. M. H., not plaintiff, and had an attachment lien on the interest of said F. M. H., in the property sold; that said property, in fact, belonged to F. M. H., and that any conveyances of the same from him to plaintiff were merely colorable, for the use and benefit of F. M. H., and made to hinder, delay, and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff; the court refused. It was held that there was no error; the petition of G. being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, it is insufficient in this, that there is no allegation of the insol-

⁸⁸ *Rose v. Mesmer*, 142 Cal. 322, 75 Pac. 905.

⁸⁹ *Home Security Bldg. etc. Assoc. v. Western Land etc. Co.*, 145 Cal. 217, 78 Pac. 626.

⁹⁰ *Walker v. Goldsmith*, 14 Or. 127, 12 Pac. 537.

⁹¹ *Goesele v. Bimeler*, 14 How. 589, 14 L. Ed. 554; affirming 5 McLean, 223, Fed. Cas. No. 5503.

⁹² *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671.

⁹³ *McCall v. Carpenter*, 18 How. 297, 15 L. Ed. 389.

vency of F. M. H., and that the charges of fraud are too general, and do not state the specific facts constituting the fraud.⁹⁴

§ 6159. Easements.—The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.⁹⁵ In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement, but not in such way as to increase the burden upon the servient tenement.⁹⁶ Partition may be maintained notwithstanding the land in question is subject to an easement.⁹⁷

§ 6160. Homestead.—On partition of lands held by tenants in common, if one of them has a homestead claim on it, his undivided interest will be set aside to satisfy the homestead claim, but not to exceed the legal value of a homestead.⁹⁸

§ 6161. Incumbrances.—If it appears to the court that there are outstanding liens or incumbrances of record, and were of record at the commencement of the action, and the persons holding such have not been made parties, the court must order them to be made parties, or appoint a referee to ascertain whether such liens have been paid, and, if not paid, the amount that remains due thereon, and whether the same has been secured, and the nature and extent of the security.⁹⁹ Lienholders not of record need not be made parties.¹⁰⁰ Where a lien is on an undivided interest, such lien, if partition be made, shall only be a charge upon the part assigned to the debtor; but such share must be charged with its proportion of costs in preference to the lien.¹⁰¹

§ 6162. Interest of parties.—The interests of all persons in the property, whether such persons be known or unknown, must be set forth in the complaint, as far as known to the plaintiff.¹⁰² When mining land is claimed and possessed by joint tenants, tenants in

⁹⁴ Harris v. Taylor, 15 Cal. 348.

⁹⁵ Cal. Civ. Code, § 803.

⁹⁶ Cal. Civ. Code, § 807.

⁹⁷ Thompson v. De Snyder (N. Mex.), 94 Pac. 1014.

⁹⁸ Higgins v. Higgins, 46 Cal. 259. As to complaint by assignee for partition of homestead, see Wilhoit v. Bryant, 78 Cal. 263, 20 Pac. 561.

⁹⁹ Cal. Code Civ. Proc., § 761. For notice to lienholders, and proceedings before referee, see same code, § 762.

¹⁰⁰ Cal. Code Civ. Proc., § 754.

¹⁰¹ Cal. Code Civ. Proc., § 769. As to where there are other securities, see same code, § 772.

¹⁰² Cal. Code Civ. Proc., § 753; Mont. Rev. Codes, § 6887; Morton v.

common, or copartners, or even partners their interests are in the nature of an inheritance, and may be partitioned as real property.¹⁰³ Where, in an action for partition, all necessary parties have been joined, any error in stating the interest and shares of the parties, or any omission to state what the plaintiff might have been compelled on motion to insert, is not an irregularity which can affect the title.¹⁰⁴

§ 6163. **Rights of parties.**—The right of partition existing in the cotenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him.¹⁰⁵ The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in this action.¹⁰⁶ Several tenants in common may elect to consider their rights as an undivided share belonging to them all, and institute a petition for partition among themselves and the other tenants in common.¹⁰⁷ Under the California practice, any question affecting the right of the plaintiff to a partition, or the rights of each and all of the parties in the land, may be put in issue.¹⁰⁸ And if disputes exist as to their rights or interest in any respect, such disputes may be litigated and determined.¹⁰⁹

§ 6164. **Interveners.**—During an action in partition, any person claiming to be interested may appear and assert his right by interpleader,¹¹⁰ and, when reasonably asserted, the court has no right to deny the intervention.¹¹¹ The proper method for a mortgagee taking a mortgage upon the premises subsequent to the filing of a partition suit is to file his petition in intervention in such partition suit.¹¹² Heirs of the deceased, instead of his executor, should be substituted as parties in partition.¹¹³

Outland, 18 Ohio St. 383; Myers v. Warner, 18 Ohio, 519; Taylor v. King, 32 Mich. 42; Rogers v. Miller, 48 Mo. 378; Hanner v. Silver, 2 Or. 336; Morenhout v. Higuera, 32 Cal. 294; Senter v. De Bernal, 38 Cal. 637; Freeman on Cotenancy, § 488.

103 Hughes v. Devlin, 23 Cal. 501.

104 Noble v. Cromwell, 27 How. Pr. 289; affirming 26 Barb. 475.

105 Stark v. Barrett, 15 Cal. 361.

106 Cal. Code Civ. Proc., § 759.

107 Ladd v. Perley, 18 N. H. 395.

108 De Uprey v. De Uprey, 27 Cal. 331, 87 Am. Dec. 81.

109 Morenhout v. Higuera, 32 Cal. 289; cited as authority in Sutter v. City etc. San Francisco, 36 Cal. 112.

110 N. Mex. Comp. Laws 1897, § 3182.

111 Baca v. Anaya (N. Mex.), 94 Pac. 1017.

112 Towle Bros. Co. v. Quinn, 141 Cal. 382, 74 Pac. 1046.

113 Adams v. Hopkins, 144 Cal. 19, 77 Pac. 712.

§ 6165. **Parties.**—The rights of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action.¹¹⁴ When several cotenants hold and are in possession of real property as parceners, joint tenants, or tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof.¹¹⁵ A partition among tenants in common must be made as to the whole tract. One tenant in common cannot have partition of a part only of the common property, and have his entire interest located on this part.¹¹⁶ A tenant in common of part of a tract of land is a proper party in a suit for the partition of the whole. The real parties in interest should be joined in partition, and the holders of a special tract, as well as the cotenants of his grantor, should be made parties to the action.¹¹⁷ In a proceeding under the Colorado statute for the partition of real estate, it is only necessary, at least in the first instance, to make those persons parties who are interested in the property as joint tenants, tenants in common, or coparceners.¹¹⁸ Neither the administrator nor the creditors of an intestate are necessary or proper parties to a bill for partition between the heirs of the estate of the intestate, even if his personal property is insufficient to pay his debts.¹¹⁹ The several parties to an action of partition, so far as its ultimate purpose is concerned, to-wit, a partition, are all actors or plaintiffs, each against each and all others, and it is in this respect a matter of no consequence whether they appear upon the face of the record in the technical attitude of plaintiffs or defendants.¹²⁰ In Oregon, reversioners and remaindermen may be made defendants in a suit for partition, but there is no statute in that state which enables them to sue as plaintiffs.¹²¹

§ 6166. **Partition by attorney.**—A power of attorney which authorizes the attorney to sell the lands of the constituent, and

114 Cal. Code Civ. Proc., § 759.

115 Cal. Code Civ. Proc., § 752.

116 Sutter v. City etc. of San Francisco, 36 Cal. 112.

117 Gates v. Salmon, 35 Cal. 576, 95 Am. Dec. 139; Hathaway v. De Soto, 21 Cal. 194. See, also, Sutter v. City etc. San Francisco, 36 Cal. 112.

118 Jordan v. McNulty, 14 Colo. 280, 23 Pac. 460.

119 Speer v. Speer, 14 N. J. Eq. 240.

120 Morenhout v. Higuera, 32 Cal. 295.

121 Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795, 23 Pac. 890. See, also, Morse v. Stockman, 65 Wis. 36, 26 N. W. 176; Alexander v. Alexander, 26 Neb. 68, 41 N. W. 1065; Jordan v. Neece, 36 S. C. 295, 31 Am. St. Rep. 869, 15 S. E. 202.

to do whatever is necessary to carry the power into execution, does not authorize the attorney to make partition of lands in which the constituent has an interest as a tenant in common. But if an attorney in fact, whose power does not authorize him to make partition of the lands of his principal, does make such a partition the principal may afterwards give effect and confirmation to the partition so made by the execution of deeds of conveyance.¹²²

§ 6167. *Interest, contingent.*—If one or more of the parties, or the share or quantity of interest of any of the parties, is unknown to the plaintiff, or is uncertain or contingent, or the ownership of the inheritance depends upon an executory devise, or the remainder is a contingent remainder, so that such parties cannot be named, that fact must be set forth in the complaint.¹²³ The complaint should set forth the nature of such contingent interest.¹²⁴

§ 6168. *Interlocutory decree.*—The judgment in an action for partition merely severs the unity of possession, but does not vest in either cotenant any new or additional title.¹²⁵ The order for partition is not a final judgment; it is followed by a judgment confirming the partition or sale.¹²⁶ But the rights of the parties are determined by the order which finds them to be tenants in common, ascertains and adjudges their respective shares, and orders a partition thereof, whether it be a final or an interlocutory order.¹²⁷ The court can order a partition to be made, but it cannot make the partition except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition. A decree ordering a partition of certain personal property not mentioned in the pleading is clearly erroneous.¹²⁸ In the action for partition under the California code, before any partition is ordered or can be made, the interests and shares of all the parties must be determined and adjudged

¹²² Borel v. Rollins, 30 Cal. 408.

¹²³ Cal. Code Civ. Proc., § 753.

¹²⁴ Van Cortlandt v. Beekman, 6 Paige, 492.

¹²⁵ Wade v. Deray, 50 Cal. 376.

¹²⁶ Hastings v. Cunningham, 35 Cal. 552. See Cal. Code Civ. Proc., § 766. See, also, as to the effect of decree in partition, Morrill v. Morrill,

20 Or. 96, 23 Am. St. Rep. 95, 25 Pac. 362, 11 L. R. A. 155; Blackwell v. McLean, 9 Wash. 301, 37 Pac. 371; Christy v. Spring Valley Wax Works, 97 Cal. 21, 31 Pac. 1110.

¹²⁷ Field v. Leiter, 16 Wyo. 1, 125 Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622.

¹²⁸ Dondero v. Van Sickie, 11 Nev. 389.

by the court, also the moieties in which the land is to be divided. Such moieties must be specified in the interlocutory judgment, so that the referees appointed to make the partition may have no question of title to determine, and may intelligently discharge the duties as to making the allotments devolved on them by the decree. An interlocutory decree which fails to observe such requirements is erroneous.¹²⁹

If it is impracticable to make a complete partition at once to all the parties, the court may direct a partition among two or more, and, from time to time, determine as to the others' rights, shares, and interests, and render a further judgment directing a partition in like manner of the undetermined parts of the property.¹³⁰ If the property cannot be divided without great prejudice, the court may order it sold.¹³¹ A mining claim is susceptible of partition by metes and bounds where it does not appear to have any known veins or bodies of ores, and depends for its value upon its proximity to other mines.¹³²

§ 6169. **New trial.**—If there is error in an interlocutory decree in partition, it must be corrected by a motion for a new trial, or by an appeal as in other cases.¹³³

§ 6170. **Notice—Lis pendens.**—Immediately after filing the complaint, the plaintiff must record in the office of the recorder of the county, or of the several counties in which the property is situated, a notice of the pendency of the action, containing the names of the parties so far as known, the object of the action, and a description of property to be affected thereby. From the time of filing such notice for record all persons shall be deemed to have notice of the pendency of the action.¹³⁴

§ 6171. **Parol partition.**—In general, a valid partition of lands cannot be made by parol, such case being within the statute of frauds. But a parol partition may be made of lands held under a trust arising by implication of law. And a parol partition, valid as between the parties, may be ratified by others interested in the

¹²⁹ *Emerie v. Alvarado*, 64 Cal. 529,
* Pac. 418, 90 Cal. 444, 27 Pac. 356.

¹³⁰ *Richardson v. Ruddy*, 10 Idaho,
151, 77 Pac. 972.

¹³¹ *Hurley v. O'Neill*, 31 Mont. 595,
79 Pac. 242.

¹³² *Ryan v. Egan*, 26 Utah, 241, 72
Pac. 933.

¹³³ *Tormey v. Allen*, 45 Cal. 119
Regan v. McMahon, 43 Cal. 625.

¹³⁴ Cal. Code Civ. Proc., § 755.

lands.¹³⁵ Family arrangements are to be regarded with favor, and a parol partition among heirs, if fairly made, is binding even upon *femes covert*, if they are parties to it, and assent to the arrangement; but only when it has been agreed to by all the joint owners, and when it has been executed.¹³⁶

§ 6172. Answer, what to contain.—If the defendant fails to answer within the time allowed by law, he is deemed to admit and adopt the allegations of the complaint. Otherwise, he must controvert that which he does not wish to admit, set forth his estate or lien, giving the date and character of any lien, the amount due thereon, and also whether he has any additional security, and, if so, its nature and extent. Failure to disclose any such security will act as a waiver of his lien.¹³⁷ An answer to the effect that another defendant had received rents for which he had not accounted, and praying for an accounting, is sufficient to call for an accounting.¹³⁸

§ 6173. Disclaimer.—In an action of partition a defendant cannot claim that the action be dismissed as to him, on the ground that his answer disclaims any interest in the land, unless he has made the disclaimer in absolute and unconditional terms. A defendant in partition is not entitled to have the action dismissed by reason of the force and effect of any defense which he may set up in his answer.¹³⁹

§ 6174. Infant.—Guardians *ad litem*, appointed to represent an infant in a case of partition, have power to defend for the infant solely against the claim set up for partition of the common estate. The proceeding for partition is a special proceeding, and the statute prescribes its course and effect; and though after jurisdiction has attached, errors in the course of the cause cannot be collaterally shown to impeach a judgment, yet, so far at least as the rights of infants are involved, the court has no jurisdiction except over the matter of partition.¹⁴⁰

¹³⁵ Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371.

¹³⁶ McConnell v. Carey, 48 Pa. St. 345. As to parol partition, see Gordon v. City of San Diego, 108 Cal. 264, 41 Pac. 301; Mathes v. Nissler, 17 Mont. 177, 42 Pac. 763.

¹³⁷ Cal. Code Civ. Proc., § 758.

¹³⁸ Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603.

¹³⁹ De Uprey v. De Uprey, 27 Cal. 331, 87 Am. Dec. 81.

¹⁴⁰ Waterman v. Lawrence, 19 Cal. 210, 79 Am. Dec. 212.

§ 6175. **Cross-complaint.**—A so-called cross-complaint in an action for partition which is only a repetition of the answer which alleges exclusive ownership and exclusive possession by the defendant requires no answer from the plaintiff.¹⁴¹

§ 6176. **Receiver.**—A receiver may be appointed in partition in proper cases, upon notice, which may be given under the original complaint.¹⁴²

§ 6177. **Costs.**—The court cannot include in an interlocutory decree in partition a judgment for costs against defendant, as it is only after final judgment that costs are to be allowed.¹⁴³ Attorneys' fees, not being specified by the statute,¹⁴⁴ cannot be taxed by the court.¹⁴⁵ But in case of an attorney appointed by the court to represent the interest of unknown owners, a reasonable fee must be allowed by the court, to be a lien upon the share of such unknown owners.¹⁴⁶

§ 6178. **Sale of property in partition.**—When a sale of the property is necessary, the title must be ascertained to the satisfaction of the court before the sale can be ordered.¹⁴⁷ If necessary, plaintiff may procure an abstract of title before commencing the action, stating in his complaint that he has done so, and where it will be kept for inspection of the parties; or the court may authorize such an abstract. The cost of the abstract, with interest, must be allowed to the party paying for the same.¹⁴⁸

If it appears to the court that the property, or any part of it, should be sold, it may order the sale and appoint three referees (or, with consent of the parties, one referee). The referees must make and report their survey and appraisement, which may be modified, confirmed, or set aside by the court, and a sale may be ordered, allowing the tenants in common a period of sixty days in which to purchase at the appraised value.¹⁴⁹

¹⁴¹ Banning v. Banning, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210.

¹⁴² Mesnager v. De Leonis, 140 Cal. 402, 73 Pac. 1052.

¹⁴³ Cal. Code Civ. Proc., § 796; Harrington v. Goldsmith, 136 Cal. 168, 68 Pac. 594.

¹⁴⁴ Wash. Bal. Codes, § 5604.

¹⁴⁵ Legg v. Legg, 34 Wash. 132, 75 Pac. 130.

¹⁴⁶ Cal. Code Civ. Proc., § 763, as amended 1907.

¹⁴⁷ Cal. Code Civ. Proc., § 759.

¹⁴⁸ Cal. Code Civ. Proc., § 799.

¹⁴⁹ Cal. Code Civ. Proc., § 763.

§ 6179. **Referee's sale, private or public.**—All sales of real property made by the referee must be made at public auction to the highest bidder, upon notice given as in case of sale on execution, unless in the opinion of the court it would be more beneficial to the parties interested to sell at private sale; the court may order or direct sale of all or any part to be made at either public auction or private sale, as the referee shall judge most beneficial to the interested parties. A private sale is conducted as in sales of real property of estates of deceased persons. The public auction is advertised and made as in sales under execution.¹⁵¹

§ 6180. **Report of referees.**—The referees must report the sale to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid or secured; the terms and conditions; and the securities taken, if any. Any purchaser, or any party to the action, may, upon ten days' notice to the other parties and to the purchaser, move the court to confirm or set aside the sale. Upon an offer of a sum ten per cent in excess of the return price, if made in writing, by a responsible person, the court may accept such offer or order a new sale.¹⁵²

The report of referees in partition will be set aside if it appears that they have not followed the directions of the court, or that they have been unjust and inequitable;¹⁵³ but it must appear by a clear preponderance of the evidence that they acted on wrong principles, or that the partition was grossly inequitable.¹⁵⁴ The report need not set out the facts concerning the character and situation of the property, or that the partition is equitable and advantageous.¹⁵⁵

§ 6181. **Final decree, or confirmation of the report.**—The court may confirm, change, modify, or set aside the report, and, if necessary, appoint new referees. Upon confirming the report, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive upon all who are entitled to a beneficial interest, upon all unknown interested persons

¹⁵¹ Cal. Code Civ. Proc., § 775, as amended 1909.

¹⁵² Cal. Code Civ. Proc., § 784.

¹⁵³ Richardson v. Ruddy, 11 Idaho, 561, 83 Pac. 606.

¹⁵⁴ Field v. Leiter, 16 Wyo. 1, 125 Am. St. Rep. 997, 90 Pac. 378, 92 Pac. 622.

¹⁵⁵ Id.

who have been served by publication of summons, and upon all persons claiming from them. The judgment is not invalidated by reason of death of any party pending the action.¹⁵⁶

Confirmation of sale in partition can be denied, for inadequacy of price, only from a consideration of the value at the time of the sale.¹⁵⁷

The right or easement to the use of an irrigation ditch constructed over a portion of the land to other parts still continues after partition of the land.¹⁵⁸ The decree of partition of land riparian to a stream does not change the character of the rights of the respective parties to the waters of the stream. The riparian rights, including the underground waters, go with the land.¹⁵⁹

FORMS IN PARTITION.

§ 6182. Complaint for partition of real property.

Form No. 1704.

[TITLE.]

The plaintiff complains, and alleges:

I. That he and the defendants C. B. and D. B. are the owners as tenants in common [or joint tenants] of the following described real estate situate in the county of . . . , to-wit [insert full description], and they are now in possession thereof.

II. That the plaintiff has an estate of inheritance therein to the extent of one undivided third part or interest in the fee thereof [or other estate], and that each of the said defendants C. B. and D. B. have a similar interest and estate therein, to-wit, an undivided third part thereof [or other proportions according to the fact].

III. That there are no liens or incumbrances thereon appearing of record, and that no person other than the plaintiff and said defendants are interested in said premises as owners or otherwise.

Wherefore, the plaintiff demands judgment:

1. For a partition of the said real property, according to the respective rights of the parties aforesaid; or if a partition cannot be had without material injury to those rights, then for a sale of

¹⁵⁶ Cal. Code Civ. Proc., § 766.

¹⁵⁷ Dunn v. Dunn, 137 Cal. 51, 69 Pac. 847.

¹⁵⁸ Cal. Civ. Code, § 1104; Ana-

heim Union Water Co. v. Ashcroft, 153 Cal. 152, 94 Pac. 613.

¹⁵⁹ Verdugo Cañon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021.

the said premises, and a division of the proceeds between the parties according to their rights.

§ 6183. Complaint for partition of real property—Unknown owners, incumbrances, etc.

Form No. 1705.

[TITLE.]

The plaintiff complains, and alleges:

I. That he has an estate of inheritance, to the extent of the one undivided fourth part thereof, in fee, in the following described premises, situate in the county of . . . , to-wit [insert description], and he is now in possession thereof.

II. That the defendants C. B. and D. B. each own the one undivided fourth part of said lands and premises in fee, and are in possession of their said interests.

III. That one G. H., who in his lifetime had an estate of inheritance therein of one undivided fourth interest in the fee, removed, several years ago, from this state to . . . ; that he subsequently married and had children, some of whom are now living, but their names and places of residence are wholly unknown to the plaintiff, and he cannot ascertain the same, or either of them, although he has made diligent inquiry for that purpose; that G. H. and his wife are now dead; and that said children, or the heirs at law of any who may be dead, are collectively entitled to the undivided fourth which appertained to the said G. H., and to which he would be entitled if now living.

IV. That the defendant L. M. holds a judgment duly given and made in the . . . district court, on or about the . . . day of . . . , 19.., in a certain action then pending in said court, wherein said L. M. was plaintiff and said defendant C. B. was defendant, for the sum of . . . dollars, which judgment was, on the . . . day of . . . , 19.., docketed in said county of [the county where the premises are situated], and remains unpaid and unsatisfied of record.

V. That the defendant O. P. holds a mortgage upon the said interest of the said D. B. for . . . dollars, payable on the . . . day of . . . , 19.., with interest from the . . . day of . . . , 19.., at . . . per centum per annum, which said mortgage is recorded in the recorder's office, in said county, in book of mortgages volume . . . , at page

VI. That no other incumbrances or liens upon said property appear of record, and no person or persons other than those above

named, and the unknown heirs of said G. H., are interested in said property.

Wherefore, the plaintiff prays judgment:

1. That the amount of said several liens may be ascertained.
2. That a partition of the said real property be made, according to the rights of the respective parties; or if a partition cannot be had without material injury to those rights, then that said premises be sold and the proceeds applied—
 1. To the payment of the general costs of this action.
 2. To the costs of reference.
3. That the residue be paid to the several owners in proportion to their respective interests, except that from the interest of the said B. C. there be first paid the amount found due to said L. M. upon his said judgment; and from the interest of said D. B. there be first paid the amount due said O. P. under said mortgage; and that the interest belonging to the unknown heirs of said G. H. be invested, under the direction of the court.

§ 6184. Complaint by a tenant in common, or a joint tenant, against a cotenant who has wasted the estate.

Form No. 1706.

[TITLE.]

The plaintiff complains, and alleges:

- I. That he is a tenant in common [or, joint tenant] with the defendant, of [describe the property].
- II. That [each of them] is entitled to an undivided [half] of the same.
- III. That between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., the defendant committed great waste upon the same [cutting down many valuable forest trees; or otherwise specify acts of waste], without the consent of the plaintiff.

Wherefore, the plaintiff demands judgment:

1. For . . . dollars damages.
2. For a partition of said premises in such manner as to compensate for such damages.

§ 6185. Allegation of judgment lien on undivided share.

Form No. 1707.

That the defendant [judgment creditor] holds a judgment recovered by him [or, by one M. N., and thereafter duly assigned

to him], duly given in the . . . court [or, in an action before O. P., justice of the peace in and for the town of . . .], on or about the . . . day of . . . , 19.., against [one or more of the cotenants], for the sum of . . . dollars; which judgment was, on the . . . day of . . . , 19.., docketed in said county of [county where the premises are situated], and remains unpaid and unsatisfied of record.

§ 6186. Allegation of mortgage lien on undivided share.

Form No. 1708.

That the defendant [mortgagee] holds a mortgage upon the said interest of [one of the cotenants] for . . . dollars, payable on the . . . day of . . . , 19.., with interest from the . . . day of . . . , 19.. : that the same is now a lien upon the interest of said . . .

§ 6187. Complaint in partition.

Form No. 1709.

[TITLE.]

For cause of action, plaintiff complains and alleges:

I. That prior to the . . . day of . . . , 19.., the plaintiff and . . . , defendant, became the owners in fee by purchase [or state manner of receiving title] of the following-described lands situated in the said county of . . . , state of California, and more particularly described as follows, to-wit [description], containing . . . acres of land, each owning in fee an undivided one-half interest therein and holding the same as tenants in common. [Or state other manner of holding; also, the specific interest of each party as far as known to plaintiff.]

[If the cotenant has died, and suit is brought against his administrator or executor and heirs, state here the execution of the will and general disposition of said property, appointment of executor, or administrator, and his qualification as such.]

II. That there are no liens or incumbrances on said lands appearing of record, or at all, and that no person other than the plaintiff and the defendant are interested in said lands and premises as owners or otherwise.

Wherefore, plaintiff demands judgment:

For a partition of said lands according to the respective rights of the parties plaintiff and defendant aforesaid; or if partition thereof cannot be had without material injury to those rights,

then for a sale of the said premises and a division of the proceeds between the parties according to their rights; and for such other and further relief as to the court seems meet and equitable.

§ 6188. Allegation as to abstract.

Form No. 1710.

That in order to properly ascertain the claims of all parties of record interested in said premises, it became necessary to have an abstract of title to said premises made; that plaintiff has secured such an abstract of title to said premises to be made, at a cost of . . . dollars; that said sum is a reasonable expense to be incurred therefor; that said abstract is now deposited at [designate place], there to remain pending this action, subject to the inspection and use of all the parties hereto.

§ 6189. Petition of guardian for permission to assent to partition of land.

Form No. 1711.

[TITLE OF COURT AND CAUSE.]

To the Honorable the Superior Court in and for the County of . . . , State of California:

Your petitioner, A. B., guardian of C. D., a minor, shows that said minor is the owner in fee of an undivided one third of all that tract of land described as follows, to-wit: [Description.]

That an action has been brought by his cotenants, E. F. and G. H., in the superior court of said . . . county, against said C. D., for partition of said land among the said cotenants.

That your petitioner believes that said land may be so divided that each owner will be benefited thereby.

Wherefore, your petitioner prays for an order of this court authorizing him to assent to the petition prayed for in said action.

That a copy of the complaint in said action is attached hereto, and is hereby referred to and made a part of this petition.

§ 6190. Answer—Pendency of action to dissolve partnership.

Form No. 1712.

[TITLE.]

The defendant answers to the complaint, and alleges:

That the premises of which the plaintiff seeks partition were purchased by the plaintiff and defendant as partners, with part-

nership funds, and for partnership purposes, in carrying on and conducting the business of [hardware merchants] as such partners, and the same is still so used for said purpose; and that prior to the commencement of this action, to-wit, on the . . . day of . . . , 19.., this defendant commenced an action in the . . . court, against the plaintiff, for a dissolution of said partnership and an accounting, and which said action and accounting involve the real property described in the complaint, and which said action is still pending and undetermined.

§ 6191. Lis pendens in partition.

Form No. 1713.

[TITLE.]

Notice is hereby given, that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to have partition adjudged of the premises hereinafter described among the owners thereof, or for a sale thereof, and a division of the proceeds among the owners according to their respective rights and interests, if it shall appear that partition cannot be made without prejudice to said owners; and that said action affects the title to the real estate described as follows, to-wit: [Here insert an accurate description of the property affected as the same is described in the complaint or petition.]

Dated, . . . 19...

J. K., Plaintiff's Attorney.

§ 6192. Summons—Partition of land.

Form No. 1714.

[TITLE.]

The People of the State of California send greeting to [name the defendants, including administrators, executors, joint tenants, tenants in common], and all persons having any interest in or lien of record by mortgage, judgment, or otherwise, upon the property hereinafter described, or any part thereof, and to all persons unknown who have or claim any interest in or lien upon that real property situated and being in the county of . . . , state of California, and more particularly described as follows; to-wit: [Description.]

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the superior court of the . . . county of . . . , state of California, within ten days after the service on you of this summons, if served within said . . . county, or within thirty days, if served elsewhere.

And you are hereby notified, that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint, including the partition of the real property hereinbefore described.

Given under my hand, etc. . . .

§ 6193. Interlocutory decree.

Form No. 1715.

[TITLE.]

This cause came on regularly to be heard upon the complaint of the above-named plaintiff and the answer of the above-named defendants, plaintiff appearing by J. K., Esq., his attorney, and defendants appearing by L. M., Esq., their attorney.

After hearing the evidence of the respective parties, and considering the same, the court does now find and declare:

That heretofore the plaintiff, A. B., and defendant C. D. were lawfully seised and possessed in fee as joint tenants [or, tenants in common] of all of the real property mentioned and described in plaintiff's complaint, and whereof the plaintiff demands partition; and that the defendant E. F. has an interest in or lien upon said premises on account of a certain mortgage [or whatever lien it be, and describe the same].

[If any estate proceedings, state findings on same here.]

That said property is so situated that the same can be partitioned between the parties according to their respective interests, without any loss or damage to said interests, and that all of the parties hereto, the said plaintiff and the said defendants, now here in open court consent that partition thereof be made between the parties according to their respective interests.

That the plaintiff, A. B., is seised and possessed of one equal undivided . . . interest in and to all of the property described in his complaint, and whereof he demands partition; and that the defendant C. D. is seised and possessed of one equal undivided

. . . interest in and to all of said property; and that the defendant E. F. has a first lien upon all of said property, by reason of that certain mortgage [describe the mortgage, judgment, or other lien], and that the amount due and owing to said defendant E. F. on account of said lien is the principal sum of . . . dollars, together with interest thereon at the rate of . . . per cent per annum, from the . . . day of . . . , 19.., until paid.

[If parties consent to one referee:] The court does further find that one referee is sufficient to make such partition, and all of the parties hereto, the said plaintiff and the said defendants, do now in open court consent that one referee in partition, and no more, be by the court appointed to make partition of said property, and that said referee be vested with all the powers to perform all the duties required or created by this interlocutory decree.

And the court does now find that P. Q., R. S., and T. U. are proper persons to be appointed as referees in partition herein, to be vested with all the powers to perform all the duties required or created by this interlocutory decree.

Wherefore, it is by the court now ordered, adjudged, and decreed, that the said plaintiff is the owner, seised in fee, of one equal undivided . . . interest and estate in and to all of said property; and that the said defendant C. D. is the owner, seised in fee, of one equal undivided . . . interest and estate in all of said property mentioned in plaintiff's complaint; that the defendant E. F. has a first lien upon all of said property, by reason of that certain mortgage [judgment, or other lien, and describe same]; that the amount due thereon is the principal sum of . . . dollars, together with interest at the rate of . . . per cent per annum from the . . . day of . . . , 19.., until paid; that said principal sum, together with interest, is due and owing from unto the said defendant . . . ; [Follow with order for payment of the sum as owing, or for such disposition as is decided upon.]

And it is by the court further ordered, adjudged, and decreed, that all of said property be partitioned between the parties hereto according to their respective interests as ascertained, declared, and established by this decree, quality and quantity relatively considered, and that after such partition the said plaintiff and the said defendants hold said property severally from each other, and not jointly.

And it is by the court further ordered, adjudged, and decreed, that P. Q., R. S., and T. U. be and they are hereby appointed referees in partition in the proceedings under this interlocutory decree, and they are hereby authorized and required to perform all the duties, and are vested with all the authority required to be performed or created by this decree, and that they, the said referees, report their proceedings under this decree, specifying the manner in which they shall have executed their trust, and describing the property divided, the shares allotted to each party, with particular description of each share, on or before the . . . day of . . . , 19..

The property mentioned in this decree, and herein ordered and adjudged to be partitioned, is that certain piece or parcel of land situate, lying, and being in the county of . . . , state of California, and more particularly described as follows: [Description.]

Done in open court this . . . day of . . . , 19..

§ 6194. Report of referees.

Form No. 1716.

[TITLE.]

P. Q., R. S., and T. U., the referees in partition in the above-entitled action, appointed and empowered by an interlocutory decree given and made in said action on the . . . day of . . . , 19.., respectfully report unto the court:

That as ordered by said interlocutory decree, and in pursuance thereto, we have made partition of all of the real property mentioned and described in said interlocutory decree, to-wit: [describe whole tract of land], between the plaintiff, A. B., on the one part, and the defendant, C. D., on the other part.

That in making said partition we divided the said property and allotted the several portions thereof to the respective parties according to their respective interests as ascertained and declared by said interlocutory decree, quality and quantity relatively considered, and that we designated the several portions so allotted to the respective parties by proper landmarks.

That in making said partition we did allot, assign, and set over, and do now allot, assign, and set over, to the plaintiff, A. B., all that part of said property particularly described as follows, to-wit: [Description.]

That in making said partition we did allot, assign, and set over, and do now allot, assign, and set over, to the said defendant, C.

D., all that part of said property particularly described as follows, to-wit: [Description.]

That we were engaged one day in making said partition and in the performance of the duties vested in and required of us by said interlocutory decree.

All of which is respectfully submitted.

[DATE.]

[SIGNATURES.]

§ 6195. Final decree—Partition.

Form No. 1717.

[TITLE OF COURT AND CAUSE.]

Now on this . . . day of . . . , 19.., this cause came on regularly to be heard upon the complaint of the plaintiff and the answer of the defendants, and upon the report of P. Q., R. S., and T. U., referees in partition, heretofore duly appointed and empowered, J. K., Esq., appearing as attorney for the plaintiff, and L. M., Esq., appearing as attorney for the defendant, C. D., and N. O., Esq., appearing as attorney for defendant, E. F.

And after hearing said report and the evidence of the respective parties, and duly considering the same, the court does now find and declare:

That said P. Q., R. S., and T. U., referees in partition, as aforesaid, have made partition of all of the real property mentioned in the interlocutory decree heretofore made and entered in the above-entitled action, and that they have divided the said property and allotted the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of said parties, as determined by the court in said interlocutory decree, and that they have designated the said several portions by proper landmarks, and proceeded in all respects as by said interlocutory decree declared; that no objection or exception has been made by any of the parties to the above-entitled action to said report of the said referees, but, upon the contrary, that all of said parties, the said plaintiff and the said defendants, now here in open court request that said report be confirmed, and consent and final judgment in partition be entered thereon.

Wherefore, it is by the court ordered, adjudged, and decreed, that said report of said referees in partition be and the same is hereby in all respects confirmed; and that all of the real property

mentioned and described in said report, and in the interlocutory decree heretofore made and entered in this action, be and the same is hereby partitioned in the manner set out in said report.

It is by the court further ordered, adjudged, and decreed, that all that real property situated in the county of . . . , state of California, mentioned in said interlocutory decree, and more particularly described as follows, to-wit: [description], be and the same is hereby allotted, assigned, and set over to the plaintiff, A. B., in fee simple, and that the said A. B. hold the same severally, and not jointly, and that he hold absolutely free from any and all claim, interest, possession, or right of possession of the defendants, or of any of them.

And it is by the court further ordered, adjudged, and decreed, that all of that certain real property situated in the county of . . . , state of California, mentioned in said interlocutory decree and more particularly described as follows, to-wit: [description], be and the same is hereby allotted, assigned, and set over to the defendant, C. D. in fee simple, and that the said C. D. hold the same severally, and not jointly, and that he hold absolutely free from any and all claim, interest, possession, or right of possession of the plaintiff, or of the defendants, or either or any of said parties. [If subject to mortgage or other lien insert: save and except that certain mortgage executed in favor of E. F., for the sum of . . . dollars, and recorded in volume . . . of mortgage records of said . . . county, at page . . . et seq., which said mortgage shall continue to be a lien upon the property herein last above described and allotted to C. D.; and that the lien of said mortgage shall be and from this date is discharged and of no force or effect as to all the property herein described and not allotted unto said C. D.]

The following is a description of the property hereinbefore referred to and which is partitioned by this final decree, to-wit: [Description of whole tract.]

Done in open court this . . . day of . . . , 19...

§ 6196. Decree of partition—Short form.

Form No. 1718.

[TITLE.]

This matter having been heard and submitted to the court for judgment, and it appearing to the court that all things directed

by law to be done prior to this order of confirmation have been done according to law and the orders of this court:

It is ordered, adjudged, and decreed, that said partition so made by said commissioner be confirmed, and the same is hereby confirmed, between said parties, and that in accordance therewith there be vested in . . . , in severalty, in lieu of his undivided share of said estate, the property described as follows, to-wit: [Description.]

[Proceed with others in same manner.]

The property to be so partitioned is described as follows, to-wit: [Description.]

CHAPTER CXLV.

QUIETING TITLE.

§ 6197. **Action to quiet title—General nature of.**—The object of this action is to determine an estate held adversely to the plaintiff, to remove what would otherwise be a cloud upon his own title.¹ An action to quiet title is in the nature of a suit in equity, and relief therein is subject to the maxim that he who asks equity must do equity.² It does not lose its equitable nature because the statute has modified the procedure and its scope to permit plaintiff out of possession to sue.³ A suit to modify a decree which enjoins the use of an easement, upon the ground of a new right of way, is an original action to quiet title.⁴ An action to prevent defendant from obstructing plaintiff's canal over defendant's land is one for damages, and not to quiet title.⁵ An action does not lie in California to quiet title to personal property.⁶ The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise, not.⁷ This action embraces every description of claim, whereby the plaintiff might be deprived of the property, or its title be clouded, or its value depreciated, or whereby he might be incommoded or damnified by the assertion of an outstanding title already held, or to grow out of the adverse pretension.⁸ Plaintiff, a riparian owner, claiming land between the meander line and the line of high water, and

¹ *Boggs v. Merced Min. Co.*, 14 Cal. 279; *Townsend v. Driver*, 5 Cal. App. 581, 90 Pac. 1071.

² *Benson v. Shotwell*, 87 Cal. 49, 25 Pac. 249. See *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497.

³ *Costello v. Muheim*, 9 Ariz. 422, 84 Pac. 906.

⁴ *Richey v. Bues*, 31 Utah, 262, 87 Pac. 903.

⁵ *Miller v. Kern Co. Land Co.*, 70 Pac. 183; affirmed, 140 Cal. 132, 73 Pac. 836.

⁶ *Fudiekar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024.

⁷ *Pixley v. Huggins*, 15 Cal. 128; *Lick v. Ray*, 43 Cal. 84; *Benner v. Kendall*, 21 Fla. 584.

⁸ *Head v. Fordyce*, 17 Cal. 149. On the subject of cancellation of instruments, see Cal. Civ. Code, §§ 3412-3414.

that the two lines did not coincide, the dispute is not one as to boundary, but as to whether there existed any upland, and quiet-title is the proper remedy, and not an action at law.⁹

§ 6193. **Action to quiet title—When it lies.**—Where an instrument which is void is outstanding against a party, or an unfounded claim is set up which he has some reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, equity will interfere and grant the appropriate relief.¹⁰ But a tax-deed based upon an assessment made under an unconstitutional act of the legislature will not constitute a cloud upon title.¹¹ Though the lien of taxes be extinguished, the title will be quieted against them.¹² In Massachusetts, a petition will not lie on behalf of the assignee for an insolvent debtor to compel a prior mortgagee from the same debtor to bring an action to test the validity of a mortgage.¹³ Nor will a citizen of another state, or of a foreign country, be ordered to bring an action to try his title to real estate in Massachusetts on the petition of a party in possession.¹⁴ This action lies where an adverse claim is *prima facie* sustainable, though actually bad, as it constitutes a cloud.¹⁵ It may be maintained for the satisfaction upon the record of judgments, apparently liens, but in fact paid;¹⁶ for the discharge from the record of a mortgage claimed to be satisfied,¹⁷ or void;¹⁸ and for the extinguishment of a widow's *prima facie* claim to dower.¹⁹ A suit for this purpose will not lie where the facts alleged, if true, would not legally affect the plaintiff's

⁹ Johnson v. Tomlinson, 41 Or. 193, 68 Pac. 406.

¹⁰ Hartford v. Chipman, 21 Conn. 488; Downing v. Wherrin, 19 N. H. 9, 49 Am. Dec. 139; Overman v. Parker, 1 Hempst. 692, Fed. Cas. No. 10623; Clark v. Smith, 13 Pet. 203, 10 L. Ed. 124; Lounsbury v. Purdy, 18 N. Y. 515; Ward v. Chamberlin, 2 Black, 430, 17 L. Ed. 319.

¹¹ Williams v. Corcoran, 46 Cal. 553; Willis v. Austin, 53 Cal. 152; Minturn v. Smith, 3 Sawy. 142, Fed. Cas. No. 9647; Detroit v. Martin, 34 Mich. 170, 22 Am. Dec. 512. Compare Whitney v. City of Port Huron, 88 Mich. 268, 26 Am. St. Rep. 291, 50 N. W. 316.

¹² Clark v. City of San Diego, 144 Cal. 361, 77 Pac. 973.

¹³ Hill v. Andrews, 12 Cush. 185; Dewey v. Bulkley, 1 Gray (Mass.), 416.

¹⁴ Macomber v. Jaffray, 4 Gray (Mass.), 82. See Munroe v. Ward, 4 Allen (Mass.), 150.

¹⁵ Tisdale v. Jones, 38 Barb. 523; Coleman v. Jaggars, 12 Idaho, 125, 118 Am. St. Rep. 207, 85 Pac. 894.

¹⁶ Shaw v. Dwight, 27 N. Y. 244, 84 Am. Dec. 275.

¹⁷ Beach v. Cooke, 28 N. Y. 508, 86 Am. Dec. 260; Smith v. Nelson, 46 Or. 1, 78 Pac. 740.

¹⁸ Stevens v. Reeves, 138 Cal. 678, 72 Pac. 346.

¹⁹ Wood v. Seely, 32 N. Y. 105.

title.²⁰ Nor will allegations of mere threats, assertions, or designs to disturb the possession of the grantee avail to sustain this form of relief.²¹ It is not enough that the deed sought to be set aside may possibly be a cloud on plaintiff's title, but it must clearly appear that the claim set up under such deed is in fact in hostility to the plaintiff's title.²²

§ 6199. **Relief.**—If the claimant makes out his title, he is entitled to a decree which will remove the cloud, but the court cannot order the land to be sold for payment of the debt found due by the original decree.²³ The judgment in such an action may contain a clause perpetually restraining the defendant from further setting up the claim so adjudged to be invalid.²⁴ In an action brought in the usual form, to quiet title, the court will not decree a specific performance of an agreement of the defendant to convey to the plaintiff's executor.²⁵ Where one has an outstanding deed which improperly clouds the title of the true owner, chancery will order such deed to be canceled and annulled.²⁶ And a decree pronouncing that a conveyance is fraudulent and void has the result to remove any cloud resulting from its execution.²⁷ So a judgment in favor of the plaintiff in an action to set aside a deed as a cloud upon the plaintiff's title has a like effect, and is an adjudication that title is in the plaintiff.²⁸

§ 6200. **Right of action.**—Plaintiff has a right to be quieted in his title whenever any claim is made to real estate of which he is in possession the effect of which claim might be litigation or the loss of his property.²⁹ So a party has a right to have his title to land protected from a sale which may create a cloud upon it.³⁰ The section of the California statute authorizes the interposition of equity in cases where previously bills of peace would not lie.³¹

²⁰ *Farnham v. Campbell*, 34 N. Y. 480; *Hotchkiss v. Elting*, 36 Barb. 38; *Johnson v. Crane*, 40 Barb. 78; *Butler v. Viele*, 44 Barb. 166.

²¹ *Madison Ave. Baptist Church v. Mission Ave. Baptist Church*, 26 How. Pr. 72.

²² *Hartman v. Reed*, 50 Cal. 485.

²³ *Ward v. Chamberlin*, 2 Black. 430, 17 L. Ed. 319.

²⁴ *Brooks v. Calderwood*, 34 Cal. 563.

²⁵ *Killey v. Wilson*, 33 Cal. 691.

²⁶ *Shattuck v. Carson*, 2 Cal. 588; *Jackson v. Tatebo*, 3 Wash. 456, 28 Pac. 916.

²⁷ *Gibbons v. Peralta*, 21 Cal. 629.

²⁸ *Marshall v. Shafter*, 32 Cal. 176. As to relief in New York, see 3 N. Y. Rev. Stats. (6th ed.) 1875, p. 579, et seq.

²⁹ *Head v. Fordyce*, 17 Cal. 149.

³⁰ *Guy v. Hermance*, 5 Cal. 73, 63 Am. Dec. 85.

³¹ *Curtis v. Sutter*, 15 Cal. 259; Cal. Code Civ. Proc., § 738.

It enlarges the class of cases in which equitable relief could formerly be sought in quieting title.

§ 6201. **Right of parties.**—A party's right is limited to the object for which it was acquired, and another party may acquire another right for similar or other purposes, not in conflict with the prior right.³²

§ 6202. **Title.**—In Indiana, in actions to remove a cloud upon title, the sources of plaintiff's title need not be alleged.³³ In New York, the facts constituting plaintiff's title and the cloud thereon should be distinctly shown.³⁴ Title in fee is not necessary; the allegation of a limited or equitable estate is sufficient.³⁵ In an action to quiet title to a quartz claim, a possessory title thereto is sufficient to maintain the action by a party in possession as against one out of possession.³⁶ But he must possess a title superior to that of his adversary, and, of course, to that of the government through whom his adversary claims, or he must possess equities which will control the title in his adversary's name.³⁷ One receiving title by an absolute deed, but in fact holding as trustee for another, may nevertheless quiet title to the property so held.³⁸ One in possession of real estate, but having no legal or equitable title thereto, cannot maintain an action to remove a cloud upon the title.³⁹ And the general rule is that in actions of this character the plaintiff must establish a legal, as distinguished from a mere equitable, title.⁴⁰ But notwithstanding this rule, under section 738 of the Code of Civil Procedure of California, the holder of an equitable title has the right to come before the court in an action to quiet title and have his equities declared

³² Hoffman v. Stone, 7 Cal. 49; O'Keiffe v. Cunningham, 9 Cal. 590; Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282.

³³ Lash v. Perry, 19 Ind. 322.

³⁴ Williams v. Ayrault, 31 Barb. 364.

³⁵ Craft v. Merrill, 14 N. Y. 456; Lounsbury v. Purdy, 18 N. Y. 515. See, also, 3 N. Y. Rev. Stats. (6th ed.) 1875, p. 579; Van Vranken v. Granite County, 35 Mont. 427, 90 Pac. 164.

³⁶ Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30.

³⁷ Boggs v. Merced Min. Co., 14

Cal. 279; Di Nola v. Allison, 143 Cal. 106, 101 Am. St. Rep. 84, 76 Pac. 976, 65 L. R. A. 419.

³⁸ McLeod v. Lloyd, 43 Or. 260, 71 Pac. 795, 74 Pac. 491.

³⁹ Jackson v. LaMoure County, 1 N. Dak. 238, 46 N. W. 449.

⁴⁰ Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. 518; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; Bryan v. Tormey, 84 Cal. 126, 24 Pac. 319; Harrigan v. Mowry, 84 Cal. 456, 22 Pac. 658, 24 Pac. 48; Moores v. Townshend, 102 N. Y. 387, 7 N. E. 401; Davis v. Sloan, 95 Mo. 552, 5 S. W. 702; Frost v. Spitley, 121 U. S.

superior to any and all opposing equities.⁴¹ And an action to quiet title to lands is maintainable in California, although the legal title thereto is in the government of the United States.⁴² One never having occupied or filed a possessory claim on public land cannot quiet title thereto.⁴³ A party owning a homestead interest in real estate may maintain an action to quiet his title thereto against the claim of others.⁴⁴

§ 6203. The complaint.—A complaint alleging that deceased placed plaintiff in possession of land under an oral contract to devise it to her upon her caring for him for the remainder of his life, and that she fully performed her part, and is still in possession, states a good cause to quiet title.⁴⁵

A complainant, having set out legal ownership of certain land and the water-right thereto, subsequent reference to "the said premises" is sufficient to include the water-right.⁴⁶ A finding will not be made of any title of plaintiff not set up in the complaint.⁴⁷ If plaintiff makes no claim in his pleading for improvements placed on the land, he cannot recover therefor upon his title being declared void.⁴⁸

A complaint to have plaintiff adjudged the owner, and to have a judgment in favor of defendant quieting his title declared void, states but one cause of action.⁴⁹ In an action to quiet title to timber, the question of possession is one of fact, and cannot be considered on demurrer.⁵⁰

§ 6204. Averments in complaint.—In an action brought by one in possession of land to try and determine an adverse claim set up by one out of possession, when the complaint avers that the defendant sets up an adverse claim, without stating what it is, and

552, 30 L. Ed. 1010, 7 Sup. Ct. 1129; *Fudiekar v. East Riverside Irr. Dist.*, 109 Cal. 29, 41 Pac. 1024.

⁴¹ *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806. See *Watson v. Sutro*, 86 Cal. 500, 24 Pac. 172, 25 Pac. 64.

⁴² *Orr v. Stewart*, 67 Cal. 275, 7 Pac. 693; *Wilson v. Madison*, 55 Cal. 5; *Brandt v. Wheaton*, 52 Cal. 430.

⁴³ *Branca v. Ferrin*, 10 Idaho, 239, 77 Pac. 636.

⁴⁴ *McKinnie v. Shaffer*, 74 Cal. 514, 16 Pac. 509.

⁴⁵ *Davies v. Cheadle*, 31 Wash. 168, 71 Pac. 728.

⁴⁶ *Brothers v. Brothers*, 29 Colo. 69, 66 Pac. 901.

⁴⁷ *United Land Assoc. v. Pacific Imp. Co.*, 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988.

⁴⁸ *Blackburn v. Lewis*, 45 Or. 422, 77 Pac. 746.

⁴⁹ *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

⁵⁰ *Weatherwax Lumber Co. v. Ray*, 38 Wash. 545, 80 Pac. 775.

the answer admits plaintiff's possession,⁵¹ and sets up the particulars of the defendant's alleged title, the burden of proof is cast upon the defendant.⁵² In an action to determine an adverse claim to land, the complaint averring that the plaintiff, who was in possession, deraigned title through a deed from G., the answer alleged that previous to the execution of G.'s deed the land was attached at suit of a creditor of his, and was subsequently in due course sold by the sheriff, at which sale defendant became the purchaser. The replication showed that a portion of the debt, on which the attachment issued, was secured by a collateral note, and that the attachment was therefore void. It was held that on these pleadings, in the absence of proof, judgment was properly entered for defendant; that if plaintiff had the right to attack the attachment in this form (a point not decided), the burden of the proof was on him to show that the attachment debt was collaterally secured.⁵³ A complaint alleging plaintiff to have title in fee is sustained by proof of an equitable title.⁵⁴ A complaint which alleges that plaintiff owns the land in fee, and that defendant is making an unfounded claim of title thereto, sufficiently shows that defendant's claim of title is "adverse" to plaintiff.⁵⁵ In Oregon, the complaint in an action brought under section 500 of the Code of Civil Procedure for the purpose of determining an adverse claim, estate, or interest in land, must allege possession by the plaintiff, either by himself or his tenants.⁵⁶ Under the provisions of the present California statute, such allegation is unnecessary, and a complaint that alleges ownership in the plaintiff, and that the defendant claims an estate or interest in the land adverse to him, which claim is without right, and that the defendant has no estate, right, title, or interest, is sufficient.⁵⁷ Under section 254 of the former Practice Act, it was necessary for the plaintiff to allege and prove possession by himself. Under the Colorado procedure, while the plaintiff in order to maintain

⁵¹ *Mitchell v. Titus*, 33 Colo. 385, 80 Pac. 1042.

⁵² *Crook v. Forsyth*, 30 Cal. 662.

⁵³ *Bostwick v. McCorkle*, 22 Cal. 669.

⁵⁴ *Oliver v. Dougherty*, 8 Ariz. 65, 68 Pac. 553.

⁵⁵ *Gillett v. Carshaw*, 50 Ind. 381.

⁵⁶ *Coolidge v. Forward*, 3 West Coast Rep. 702, 832.

⁵⁷ Cal. Code Civ. Proc., § 738;

Rough v. Simmons, 65 Cal. 227, 3 Pac. 804; *Rough v. Booth*, 2 West Coast Rep. 832. As to New York procedure, see 3 Rev. Stats. (6th ed.) 1875, p. 579 et seq.; *Hager v. Hager*, 38 Barb. 92. As to right to jury trial in action to determine adverse claim, see *Crocker v. Carpenter*, 98 Cal. 418, 33 Pac. 271; *Donahue v. Meister*, 88 Cal. 121, 22 Am. St. Rep. 283, 25 Pac. 1096.

the statutory action must aver and prove his possession coupled with title, the duty is devolved upon the defendant of asserting an adverse interest in himself and specifying its nature. And before the defendant can put the plaintiff upon proof touching his possession and title, he must plead accordingly.⁵⁸ A complaint which alleges that the plaintiff is the owner of the property; that the defendant claims an interest therein adversely to the plaintiff; that such claim is without right, and that the defendant has no right, title, or interest in the property, is sufficient in an action to determine an adverse claim.⁵⁹ This action will lie, although the adverse claim rests on proceedings which are void on their face.⁶⁰ It is not necessary to allege or define the nature and character of the adverse claim.⁶¹ A complaint is not objectionable, however, which alleges defendant's claim, and sets it out as different to defendant's own claim in his answer.⁶² The complaint need not allege that plaintiff is a married woman, as she may, under the code, sue alone.⁶³

§ 6205. **Averment of title.**—Where in an action to quiet title the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon. It will be presumed that every fact has been alleged which can be proved.⁶⁴ Plaintiff must establish the validity of his own title as well as the invalidity of that of his opponent.⁶⁵ A complaint in such action, counting upon title alone, is not supported by evidence of prior possession insufficient to make title under the statute of limitations. The plaintiff in such case must stand upon title, and this may be defeated by the defendant in possession showing an outstanding title in a third person, without connecting himself with it.⁶⁶

⁵⁸ Wall v. Magnes, 17 Colo. 476, 30 Pac. 56; Amter v. Conlon, 3 Colo. App. 185, 32 Pac. 721.

⁵⁹ Castro v. Barry, 79 Cal. 443, 21 Pac. 946. See Stoddard v. Burge, 53 Cal. 394; Pfister v. Dasey, 65 Cal. 403, 4 Pac. 393; Weston v. Estey, 22 Colo. 334, 45 Pac. 367.

⁶⁰ Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55.

⁶¹ Amter v. Conlon, 22 Colo. 150, 43 Pac. 1002.

⁶² Merk v. Bowery Min. Co., 31 Mont. 298, 78 Pac. 519.

⁶³ Parsons v. Weis, 144 Cal. 410, 77 Pac. 1007.

⁶⁴ Turner v. White, 73 Cal. 300, 14 Pac. 794; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Gruwell v. Seybolt, 82 Cal. 7, 22 Pac. 938.

⁶⁵ Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151.

⁶⁶ McGrath v. Wallace, 85 Cal. 622, 24 Pac. 793.

§ 6206. **Allegation of fraud.**—When a cause of action to quiet title depends upon the proof of fraud, the facts constituting the fraud must be specially averred in the complaint; otherwise, they cannot be proved.⁶⁷

§ 6207. **Burden of proof.**—In an action to quiet title the burden rests upon the plaintiff to show title in himself, and if he fails to make out a case he is not entitled to recover.⁶⁸

§ 6208. **Correcting mistake in deed.**—A complaint, although insufficient for the purpose of correcting a mistake in a deed, may, if it states facts sufficient to constitute such a cause of action, be considered as a complaint to quiet title to the portion of the land erroneously included in the deed.⁶⁹

§ 6209. **Cancellation of deed.**—Land granted for school purposes only, being abandoned by grantees, the grantor entering into possession may sue to cancel the deed and quiet his title.⁷⁰ Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, and the money is afterwards fraudulently attached in a suit brought by the real, though not ostensible, purchaser against the husband alone, equity will compel a cancellation of the deed so obtained.⁷¹ So where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled, or it will interfere and prevent a sale, and the consequent execution of an improper deed.⁷² In an action by the state for the cancellation of a patent to certain swamp land, on the ground that the application for the purchase thereof was defective, the complaint must specifically allege that

⁶⁷ *Burris v. Adams*, 96 Cal. 664, 31 Pac. 565; *Green v. Hayes*, 70 Cal. 276, 11 Pac. 716.

⁶⁸ *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407; *Heney v. Pesoli*, 109 Cal. 53, 41 Pac. 819.

⁶⁹ *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409.

⁷⁰ *Papst v. Hamilton*, 133 Cal. 631, 66 Pac. 10.

⁷¹ *Still v. Saunders*, 8 Cal. 281.

⁷² *Shattuck v. Carson*, 2 Cal. 589. As to complaint in action for cancellation of deed for unsoundness of mind of grantor, see *Maggini v. Pezzoni*, 76 Cal. 631, 18 Pac. 687. As to cancellation of deed for inadequacy of consideration, see *Maloy v. Berkin*, 11 Mont. 138, 27 Pac. 442. As to complaint in action to cancel patent to state lands, see *People v. Martz*, 74 Cal. 110, 15 Pac. 449.

the patent was issued on the application claimed to be defective.⁷³ A deed acknowledged in a foreign state, and not properly certified, may still furnish a prevailing equitable title.⁷⁴

§ 6210. **Clouds on title.**—Every deed from the same source through which plaintiff derives his real property, if valid on its face, is a cloud on the title.⁷⁵ A sale by an administrator without an order by the probate court, or under an order void for want of jurisdiction, constitutes no cloud.⁷⁶ An action to set aside foreclosure proceedings as constituting a cloud on the plaintiff's title cannot be maintained where such foreclosure proceedings were void on the face of the record.^{76a} A sale of real estate by a sheriff, upon an execution against the grantor, will, even if not effectual to pass the title to the purchaser, create a doubt as to the validity of the grantee's title, and cast a cloud upon it, and the grantee can maintain an action to enjoin the sale.⁷⁷ And a sheriff's deed, upon an execution sale, would have the same effect in casting a cloud as a deed made directly by the vendor.⁷⁸ So when a homestead was sold by the sheriff.⁷⁹ So, also, a sale by an administrator of land, once the property of the intestate, but sold during his lifetime, will cast a cloud on the intestate's prior grantee's title.⁸⁰ An apparently good record title to land constitutes a cloud on the title thereof which has been subsequently acquired by adverse possession under the statute of limitations.⁸¹ If proof be necessary to defend possession of the premises a cloud exists; otherwise, not.⁸² An order of a board of supervisors laying out a road, which order is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes.⁸³

⁷³ *People v. Bryan*, 73 Cal. 376, 14 Pac. 893. As to jurisdiction in equity to compel the cancellation of deeds, see *Anderson v. Hammon*, 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228; *Wiard v. Brown*, 59 Cal. 194; *Jackson v. Tatebo*, 3 Wash. 456, 23 Pac. 916; *Muzzy v. Tompkinson*, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652; *People v. Tynon*, 2 Colo. App. 131, 29 Pac. 809.

⁷⁴ *Bloomington v. Weil*, 29 Wash. 611, 70 Pac. 94.

⁷⁵ *Pixley v. Huggins*, 15 Cal. 127.

⁷⁶ *Florence v. Paschal*, 50 Ala. 28.

^{76a} *Morris v. McKnight*, 1 N. Dak. 266, 47 N. W. 375.

⁷⁷ *Englund v. Lewis*, 25 Cal. 337.

⁷⁸ *Id.*; *Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689.

⁷⁹ *Riley v. Pehl*, 23 Cal. 70.

⁸⁰ *Thompson v. Lynch*, 29 Cal. 189.

⁸¹ *Arrington v. Liscom*, 34 Cal. 365, 94 Am. Dec. 722.

⁸² *Pixley v. Huggins*, 15 Cal. 127.

⁸³ *Leach v. Day*, 27 Cal. 643. As to when injunction will be issued to restrain a sale of lands which would

§ 6211. **Mortgage on homestead.**—Where A., a married man, mortgaged the homestead to B., without concurrence of his wife, and A. and his wife subsequently mortgaged to C., and B. and C. both foreclosed their mortgages, neither making the other a party, whereupon C. filed a bill against B. to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value five thousand dollars, it was held that C. could urge the same objections to the mortgage of B. that A. and his wife could; that B.'s decree was a cloud upon the title, and impaired the security; and that C. was entitled to have it set aside.⁸⁴ The owner of the legal title to land may maintain an action to quiet title against the claimant of an invalid mortgage lien.⁸⁵ A mortgage placed on property by a husband who is being sued for divorce by his wife, who has a receiver appointed to take charge of the property, such mortgage, being allowed by the court, cannot afterwards be questioned by her.⁸⁶

§ 6212. **Sheriff's title.**—Parties claiming by sheriff's deed to property not in actual possession of any one, may maintain an equitable action to try title or remove a cloud.⁸⁷ Plaintiff purchased at sheriff's sale, under foreclosure of mortgage, for twenty dollars, property which was shown to be worth three thousand, with a rental of fifty dollars per month. The defendant purchased the property under another mortgage sale for two thousand dollars, and the plaintiff being in possession filed his bill to cancel defendant's deed, and remove the cloud from his title. To entitle a party to this relief, it must appear that the contract was fair, just, and reasonable, and founded upon an adequate consideration, as a court of equity will not use its powers to complete a speculation which is already too fortunate to obtain its favorable regard.⁸⁸ In an action against the sheriff and purchaser at an execution sale, jointly, to restrain issuance of a deed on the ground of a void judgment, and the sheriff answers that he refused to issue a deed on such judg-

cast a cloud on plaintiff's title, see "Injunction," chapter LXXXVIII, ante, §§ 2859, 2866, 2875.

⁸⁴ *Dorsey v. McFarland*, 7 Cal. 342.

⁸⁵ *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824.

⁸⁶ *White v. Costigan*, 134 Cal. 33, 66 Pac. 78.

⁸⁷ *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748; Wash. Bal. Codes, § 5521.

⁸⁸ *Dunlap v. Kelsey*, 5 Cal. 181. As to sufficiency of complaint in action to remove cloud from title, see *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108.

ment because the court had declared it void, there is no cause of action.⁸⁹

§ 6213. Confirmation of surveys.—The system of locating by final survey Mexican and Spanish grants of land in California, under the act of Congress of March 3, 1851, was essentially modified by the act of Congress of June 14, 1860. The proceedings had under this act, after the return of the survey and plot into the district court, are strictly judicial in their character, and the decree rendered thereon is final and conclusive to all parties to it. If after a decree confirming a survey a decree is made confirming a survey of another prior grant covering the same land, and the confirmer in the first decree is a party to the second decree, consenting thereto, he is bound by it.⁹⁰

§ 6214. Disclaimer.—If the defendant disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs.⁹¹ Otherwise, if the disclaimer is only partial.⁹² A defendant disclaiming who is compelled to remain in the case, on account of another defendant filing a cross-complaint against him, may recover costs against the cross-complainant.⁹³

§ 6215. Facts to be alleged.—In an action to remove a cloud, the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated. To merely name the instrument would not ordinarily be sufficient; but where the instrument is a tax-deed, we think the name sufficient for the purpose of showing its apparent validity.⁹⁴ When the complaint in an action to quiet

⁸⁹ *Young v. Hatch*, 30 Colo. 422, 70 Pac. 693.

⁹⁰ *Treadway v. Semple*, 28 Cal. 661; *Waterman v. Smith*, 13 Cal. 373; *Semple v. Wright*, 32 Cal. 659; cited in *Yates v. Smith*, 38 Cal. 60; decided on authority of *Rodriguez v. United States*, 1 Wall. 587, 17 L. Ed. 689. See, also, *Toland v. Mandell*, 38 Cal. 30; *Valentine v. Sloss*, 103 Cal. 215, 37 Pac. 326, 410.

⁹¹ Cal. Code Civ. Proc., § 739. See *Castro v. Barry*, 79 Cal. 443, 21 Pac.

946; *Bulwer etc. Min. Co. v. Standard etc. Min. Co.*, 83 Cal. 589, 23 Pac. 1102; *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

⁹² *Moore v. Clackamas County*, 40 Or. 536, 67 Pac. 662; *Moore v. Wallace*, 16 Okla. 114, 82 Pac. 825.

⁹³ *Summerville v. March*, 142 Cal. 554, 100 Am. St. Rep. 145, 76 Pac. 388.

⁹⁴ *Hibernia Sav. etc. Soc. v. Ordway*, 38 Cal. 679.

title shows, by necessary implication, that the defendant's claim is invalid as against the plaintiff, it need not so aver in terms.⁹⁵ An allegation in the complaint that the judgment constituting the cloud was rendered without jurisdiction is a sufficient averment, in the absence of a demurrer, as to the invalidity of the judgment.⁹⁶ So, where the facts stated in the complaint show that the plaintiff has a valid interest in the land, it is held sufficient, without alleging specially that the plaintiff has a valid interest in, or right to, the possession of the land.⁹⁷ An allegation that the plaintiff is "the owner" of land is of an ultimate fact, and is a sufficient statement of the plaintiff's right in an action to quiet title.⁹⁸ A tax-deed in Oregon is *prima facie* evidence of title, and the averment in a complaint to remove a cloud on title that the defendant claims under a tax-deed sufficiently shows the apparent validity of the outstanding title.⁹⁹ A tax-deed, however, founded on an assessment levied under an unconstitutional act of the legislature, constitutes no cloud.¹⁰⁰ But in Oregon it is held otherwise.¹⁰¹

§ 6216. **Jurisdiction and venue.**—Actions to quiet title to land must be brought in the county where the land is situated;¹⁰² and the question of jurisdiction is to be determined from the allegations of the complaint.¹⁰³ In Colorado, a county court has jurisdiction of a suit in equity to quiet title to premises not exceeding two thousand dollars in value.¹⁰⁴ A court of equity has jurisdiction at the suit of the judgment creditor who has purchased land at sheriff's sale, and received a sheriff's deed therefor, to annul and set aside as a cloud upon the title a deed of land given to defraud the creditor before the recovery of judgment.¹⁰⁵ The

⁹⁵ Heeser v. Miller, 77 Cal. 192, 19 Pac. 375.

⁹⁶ Hyde v. Redding, 74 Cal. 493, 16 Pac. 380.

⁹⁷ Wagner v. Law, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784.

⁹⁸ Souter v. Maguire, 78 Cal. 543, 21 Pac. 183. See Batchelder v. Baker, 79 Cal. 266, 21 Pac. 754; Fudickar v. East Riverside Irr. Dist., 109 Cal. 29, 41 Pac. 1024.

⁹⁹ Day v. Schnider, 28 Or. 457, 43 Pac. 650.

¹⁰⁰ Williams v. Corcoran, 46 Cal. 553; Willis v. Austin, 53 Cal. 152; Minturn v. Smith, 3 Sawy. 142, Fed. Cas. No. 9647.

¹⁰¹ Tilton v. Oregon C. M. R. Co., 3 Sawy. 22, Fed. Cas. No. 14055. See Day v. Schnider, 28 Or. 457, 43 Pac. 650.

¹⁰² Cal. Const., art. 6, § 5.

¹⁰³ Miller v. Kern County Land Co., 140 Cal. 132, 73 Pac. 836.

¹⁰⁴ Arnett v. Berg, 18 Colo. App. 341, 71 Pac. 636.

¹⁰⁵ Hager v. Shindler, 29 Cal. 47;

courts of the United States may entertain jurisdiction in chancery, to grant perpetual injunctions for quieting inheritances, after the title has been fairly settled.¹⁰⁶ And citizens of other states have the right to come into such courts to have the rights secured them under the laws of the states where the land is situated, protecting individual rights to the soil of such states, enforced.¹⁰⁷ The filing of *lis pendens* is not essential to jurisdiction.¹⁰⁸

§ 6217. **Laid out in lots.**—Where land has been laid out in lots, and divided among many occupants, a bill will lie, although complainants had a legal title and a remedy at law in each several case.¹⁰⁹ Title to many different lots may be quieted in the same action if the adverse title is in the same party.¹¹⁰

§ 6218. **Land bounded by river.**—In an action to determine the adverse claim to land lying on both sides of a river, if the plaintiff shows a right to only that portion of the land on the north side of the river, he is not entitled to recover with respect to that located on the south side.¹¹¹

§ 6219. **Limitations, statute of.**—Adverse possession of land for the time required by the statute of limitations gives an absolute right to the party in possession, and entitles him to all the remedies given by the law to quiet his possession. He may, therefore, maintain an action against the party having the record title to have the same declared void.¹¹² A cloud created by alleged overvaluations by tax-assessors for four successive years may be removed by suit.¹¹³ The city authorities may be compelled by

Wagner v. Law, 3 Wash. 500, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927, 15 L. R. A. 784.

¹⁰⁶ Wickliffe v. Owings, 17 How. 47, 15 L. Ed. 44.

¹⁰⁷ Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; Parker v. Overman, 18 How. 137, 15 L. Ed. 318; Bayerque v. Cohen, 1 McAll. 113, Fed. Cas. No. 1134.

¹⁰⁸ Blackburn v. Bucksport, 7 Cal. App. 649, 95 Pac. 668.

¹⁰⁹ Crews v. Burcham, 1 Black, 352, 17 L. Ed. 91.

¹¹⁰ Mitchell v. Knott, 43 Colo. 135, 95 Pac. 335.

¹¹¹ Van Vleet v. Olin, 4 Nev. 95, 97 Am. Dec. 513. As to complaint in action to quiet title to water-right, see Salazar v. Smart, 12 Mont. 395, 36 Pac. 676; Harris v. Harrison, 93 Cal. 676, 29 Pac. 325; Standart v. Round Valley W. Co., 77 Cal. 399, 19 Pac. 689; Peregov v. Sellick, 79 Cal. 568, 21 Pac. 966.

¹¹² Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722.

¹¹³ Miller v. Pierce County, 28 Wash. 110, 68 Pac. 358.

order of court to cancel assessment liens judicially found to be barred by the statute of limitations.¹¹⁴ While absence from the state suspends the running of the statute of limitations against a mortgagee's right to foreclose, it will not prevent the attachment of other liens after the time limit has elapsed, so as to give the liens priority over the mortgage.¹¹⁵ In Washington, a judgment debtor has seven years' time in which to quiet title as against a purchaser at execution sale who goes into possession, and such debtor is not limited to the one year's time of appeal from a judgment.¹¹⁶ An action to recover land or a railroad right of way, against one in adverse possession, is barred if not brought within the statutory period.¹¹⁷ Neither the mortgagor nor his assigns can quiet title against the mortgagee without offering to pay off the mortgage debt, even though the debt be barred by the statute of limitations.¹¹⁸

§ 6220. Location on state lands.—No right of the locator on state lands, under the statute of California of April 27, 1863,¹¹⁹ inchoate or otherwise, attaches till the certificate of the oath prescribed by the twenty-eighth section, indorsed on a description of the land, is filed in the office of the county recorder.¹²⁰

§ 6221. Mining claims.—Mining claims fall within the operation of section 254 of the California Practice Act.¹²¹ Plaintiff must recover upon the strength of his own title; and want of title in defendant is immaterial.¹²² To quiet title to a quartz mining claim located on the public lands of the United States, a possessory title thereto is sufficient to maintain the action by a party in possession as against one out of possession.¹²³ The

¹¹⁴ Cushing v. City of Spokane, 45 Wash. 193, 122 Am. St. Rep. 890, 87 Pac. 1121.

¹¹⁵ Brandenstein v. Johnson, 140 Cal. 29, 73 Pac. 744.

¹¹⁶ Krutz v. Isaacs, 25 Wash. 566, 66 Pac. 141; Wash. Bal. Codes, §§ 5500, 5501.

¹¹⁷ Wash. Bal. Codes, § 4797; Northern Pacific Ry. Co. v. Hasse, 28 Wash. 353, 92 Am. St. Rep. 840, 68 Pac. 882, 25 Sup. Ct. 305, 197 U. S. 9, 49 L. Ed. 642.

¹¹⁸ Burns v. Hiatt, 149 Cal. 617, 117 Am. St. Rep. 157, 87 Pac. 196;

Nugent v. Stofella (Ariz.), 84 Pac. 910; Katz v. Obenchain, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617.

¹¹⁹ Stats. 1863, p. 591.

¹²⁰ Dunn v. Ketchum, 38 Cal. 93.

¹²¹ Code Civ. Proc., § 738; Merced Min. Co. v. Fremont, 7 Cal. 319, 68 Am. Dec. 262.

¹²² Schroder v. Aden Gold Min. Co., 144 Cal. 628, 78 Pac. 20.

¹²³ Pralus v. Pacific G. & S. Min. Co., 35 Cal. 30. As to pleadings in action, see Bulwer etc. Min. Co. v. Standard etc. Min. Co., 83 Cal. 589, 613, 23 Pac. 1102, 1109.

eleventh section of the act of March, 1856, "for the protection of actual settlers, and to quiet land titles in this state" (California) does not apply to miners engaged in simply extracting gold from a quartz vein. They are not "settled upon," in the sense of the statute, and two years' limitation of the eleventh section cannot avail them.¹²⁴ This section only applies to actions brought to recover the possession of lands, after the issuance of a patent.¹²⁵ Patent for a placer claim will pass a lode.¹²⁶ F., defendant, began suit against the Volcano Water and Mining Company, to subject to sale the ditch of that name, including aqueducts, flumes, culverts, dams, cabins, etc., in enforcement of a mechanic's lien. Subsequently, the ditch, etc., was sold on a judgment in favor of one H., and purchased by S., from whom plaintiff, as judgment creditor of the company, redeemed, and in due time received the sheriff's deed. Afterwards F. had a decree directing a sale of the ditch, etc., to satisfy his lien. Plaintiff sues to quiet title, alleging that F.'s decree is fraudulent, that he has no lien, and that he is about enforcing the decree, which is a cloud on plaintiff's title. It was held that, aside from any question of fraud, the action lies; that the existence of a decree, founded upon proceedings taken prior to plaintiff's title, and seeking to condemn the property by virtue of an asserted lien older than such title, would be a cloud upon that title.¹²⁷

Under the act of Congress of May 10, 1872, declaring that only those who are citizens of the United States, or have properly declared their intention to become such, can either locate or purchase mineral lands, an allegation of citizenship or its equivalent is necessary to constitute a good complaint in a proceeding to determine adverse mining claims preliminary to the issuance of a patent therefor.¹²⁸ But in an action to quiet title to a mining claim, brought in a state court the question of citizenship is immaterial.^{128a} And to warrant a recovery in an adverse proceeding by a party whose title is based wholly or in part upon an entry and location by a corporation, he must allege and prove the organization of such corporation and the qualification

¹²⁴ *Fremont v. Seals*, 18 Cal. 435.

¹²⁵ *Morton v. Folger*, 15 Cal. 275.

¹²⁶ *Crane's Gulch Min. Co. v. Seherer*, 134 Cal. 350, 86 Am. St. Rep. 279, 66 Pac. 487.

¹²⁷ *Head v. Fordyce*, 17 Cal. 149.

¹²⁸ *Keeler v. Trueman*, 15 Colo.

143, 25 Pac. 311. See *Lee Doon v. Tesh*, 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.

^{128a} *Gruwell v. Rocco*, 141 Cal. 417,

of its members.¹²⁹ In such action it is held unnecessary to allege in the complaint that the action was brought in respect to the property mentioned in the adverse claim.¹³⁰ In an action to quiet title to a vein or lode it is sufficient to describe such lode by its name, if the lot or mining claim in which it has its apex is specifically described.¹³¹ The complaint in an action to quiet title to a mining claim which does not show on its face that it is brought under section 2326 of the United States Revised Statutes is not defective for failing to allege that the plaintiff is a citizen of the United States.¹³² The jurisdiction and procedure governing such action depend entirely upon the constitution and laws of the state, and are not based upon section 2326 of the Revised Statutes of the United States.¹³³

§ 6222. **Municipal corporation.**—A municipal corporation cannot invoke the aid of a court of equity to set aside a grant made by its authorities when the grant is void. Such a grant being a nullity, casts no cloud upon the title of the corporation.¹³⁴ The city authorities may be compelled to cancel street assessment liens which are barred by the statute of limitations.¹³⁵

§ 6223. **Notice.**—In an action to quiet title against parties claiming from the same source of title through a prior unrecorded conveyance, it is necessary to aver want of notice of the conveyance.¹³⁶

§ 6224. **Outstanding title.**—In an action to quiet title, brought under the California statute, the defendant cannot defeat the plaintiff's action by showing an outstanding title, unless he connects himself therewith,¹³⁷ or is in possession himself.¹³⁸

74 Pac. 1028; *Buckley v. Fox*, 8 Idaho, 248, 67 Pac. 659.

¹²⁹ *Thomas v. Chisholm*, 13 Colo. 105, 21 Pac. 1019.

¹³⁰ *Hoffman v. Beecher*, 12 Mont. 489, 31 Pac. 92.

¹³¹ *Bullion etc. Min. Co. v. Eureka Hill Min. Co.*, 5 Utah, 3, 11 Pac. 515.

¹³² *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182.

¹³³ *Altoona etc. Min. Co. v. Integral etc. Min. Co.*, 114 Cal. 100, 45 Pac. 1047; 420 Min. Co. v. Bullion

Min. Co., 9 Nev. 240, 3 Sawy. 634, Fed. Cas. No. 4989.

¹³⁴ *Oakland v. Carpentier*, 21 Cal. 642.

¹³⁵ *Cushing v. City of Spokane*, 45 Wash. 193, 122 Am. St. Rep. 890, 87 Pac. 1121.

¹³⁶ *Lawton v. Gordon*, 34 Cal. 36, 91 Am. Dec. 670.

¹³⁷ *Niagara etc. Min. Co. v. Bunker Hill etc. Co.*, 59 Cal. 612.

¹³⁸ *McGrath v. Wallace*, 85 Cal. 622, 24 Pac. 793.

§ 6225. **Title of plaintiff.**—The legal title prevails over the equitable.¹³⁹ Plaintiff cannot sue unless he has an interest in the title;¹⁴⁰ but that interest may be merely equitable.¹⁴¹ The fact that plaintiff might have secured title by deed does not deny him the benefit of his title by adverse possession.¹⁴² The right of possession without actual possession is sufficient,¹⁴³ and quiet-title instead of ejectment may be brought by such a one.¹⁴⁴

§ 6226. **Parties plaintiff and defendant.**—An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.¹⁴⁵ Minors are included.¹⁴⁶ But it cannot be maintained by a landlord against his tenant in possession, for the purpose of determining the validity of an adverse title set up by the tenant.¹⁴⁷ Plaintiff need not plead her marriage *status*, as a married woman may sue alone to quiet title.¹⁴⁸ Until administration of an estate is ended, an administrator is the proper party plaintiff in an action to quiet title to the estate.¹⁴⁹ But under section 1452 of the California Code of Civil Procedure heirs or devisees may themselves, or jointly with the executor or administrator, maintain the action against any one but the executor or administrator. Any two or more persons claiming any interest in land under a common source of title, whether holding as tenants in common, joint tenants, coparceners, or in severalty, may unite in one action against any person claiming an adverse estate therein;^{149a} and this rule applies to devisees receiving separate moieties, both of which are affected by the same cloud.¹⁵⁰ One tenant in common of real property may maintain an action to determine the validity of an adverse claim of title thereto by

¹³⁹ *Spotswood v. Spotswood*, 4 Cal. App. 711, 89 Pac. 362.

¹⁴⁰ *Lewis v. Clements*, 21 Okla. 167, 95 Pac. 769.

¹⁴¹ *Holmes v. Wolfard*, 47 Or. 93, 81 Pac. 819; *Van Vranken v. Granite County*, 35 Mont. 427, 90 Pac. 164; *Consolidated Plaster Co. v. Wild*, 42 Colo. 202, 94 Pac. 285.

¹⁴² *Orack v. Powleson*, 3 Cal. App. 282, 85 Pac. 129.

¹⁴³ *White v. McSorley*, 47 Wash. 18, 91 Pac. 243.

¹⁴⁴ *Carlson v. Curren*, 48 Wash. 249, 93 Pac. 315.

¹⁴⁵ Cal. Code Civ. Proc., § 738; *Horn v. Jones*, 28 Cal. 194.

¹⁴⁶ *Harding v. Harding*, 46 Or. 178, 80 Pac. 97.

¹⁴⁷ *Van Winkle v. Hinckle*, 21 Cal. 342.

¹⁴⁸ *Parsons v. Weis*, 144 Cal. 410, 77 Pac. 1007.

¹⁴⁹ *Curtis v. Sutter*, 15 Cal. 259.

^{149a} Cal. Code Civ. Proc., § 381.

¹⁵⁰ *Gillespie v. Gouly*, 152 Cal. 643, 93 Pac. 856.

a cotenant.¹⁵¹ If neither party has title to the land, neither is entitled to a judgment against the other.¹⁵² Any person in possession may bring an action against any party who claims an estate or interest adverse to him.¹⁵³ And the action may be brought by the party in possession without waiting until he has been disturbed in his possession by legal proceedings against him in which his title has been successfully maintained.¹⁵⁴ An action cannot be maintained against the street commissioner of an incorporated city to quiet title to land alleged to be a public street or highway. The acts of such officer in opening streets are the acts of the city.¹⁵⁵

The possession of a tenant is the possession of his landlord, and is sufficient to enable the latter to maintain an action to quiet title, notwithstanding the tenant, without his knowledge or consent, may have paid rent to the party claiming adversely.¹⁵⁶ In a suit to quiet title to the real property of a deceased testator, the administrator, a living devisee, and the heirs of a deceased devisee may properly unite as parties plaintiff.¹⁵⁷ And in a suit to quiet title to land against the estate of a deceased person, both the personal representative of the decedent and his heirs at law are proper parties defendant.¹⁵⁸ A trustee holding the legal title to the premises in controversy, although he has no beneficial interest therein, is a proper party to a final determination of the controversy, and may be brought in as a party defendant by an amendment to the complaint.¹⁵⁹ In an action to quiet title against an unfounded claim of the defendants, a mortgagee of the defendants is not a necessary party.¹⁶⁰ Under the provisions of the Consolidation Act of 1850, the city and county of San Francisco could properly be made a party defendant in an action to quiet title at the instance of a private person.¹⁶¹ Where the trustees of a corporation hold property in trust for its uses, their ownership and possession are the ownership and possession of

¹⁵¹ *Ross v. Heintzen*, 36 Cal. 313.

¹⁵² *City of San Diego v. Allison*, 46 Cal. 102.

¹⁵³ *Merced Mining Co. v. Fremont*, 7 Cal. 319, 68 Am. Dec. 262.

¹⁵⁴ *Id.*; *Curtis v. Sutter*, 15 Cal. 259.

¹⁵⁵ *Leet v. Rider*, 48 Cal. 623.

¹⁵⁶ *Merchants' State Bank v. Porter*, 20 Colo. 216, 37 Pac. 960; *Amter v. Conlon*, 22 Colo. 150, 43 Pac. 1002.

¹⁵⁷ *Miller v. Luco*, 80 Cal. 257, 22 Pac. 195.

¹⁵⁸ *Louvall v. Gridley*, 70 Cal. 507, 11 Pac. 777.

¹⁵⁹ *Reynolds v. Lincoln*, 71 Cal. 183, 9 Pac. 176, 12 Pac. 449.

¹⁶⁰ *Snodgrass v. Parks*, 79 Cal. 55, 21 Pac. 429.

¹⁶¹ *San Francisco v. Holladay*, 70 Cal. 18, 17 Pac. 942. See *San Francisco v. Itsell*, 80 Cal. 57, 22 Pac. 74;

the corporation, and the corporation has a sufficient interest in the property to bring an action in its corporate name to quiet title thereto, and to restrain by injunction a threatened interference with the possession.¹⁶² So a Roman Catholic archbishop, alleging that he is a corporation sole, and is the owner and seised in fee of certain land which he holds in trust for the Roman Catholic Church, has a sufficient interest to maintain an action to quiet title.¹⁶³

§ 6227. **Parties defendant.**—Plaintiff may make all the adverse claimants defendants, even though there be no privity or connection between them.¹⁶⁴ The plaintiff filed her bill to remove a cloud upon her title to land created by her husband's deed to one of the defendants, and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property executed by them. It was held that the latter were unnecessary parties, as the grantee in the deed from the husband and those claiming under him were the only parties necessary to a complete adjudication of the case.¹⁶⁵ Sale being made by plaintiff of the same land to two different vendees, both such vendees are necessary parties in a quiet-title action against one of them.¹⁶⁶ The title to many different lots may be quieted in the same action when the adverse title is in the same party.¹⁶⁷ All persons known to plaintiff to have some adverse claim, or other persons unknown claiming any right, may be made defendants, besides those claiming adversely of record;¹⁶⁸ but failure of plaintiff to examine the records and name as defendants all adverse claimants does not invalidate the complaint against defendants named and served.¹⁶⁹

§ 6228. **Adverse possession—Public property.**—The statutes giving title by adverse possession after a certain time do not apply to public lands held for a public purpose.¹⁷⁰ One holding

People v. Holladay, 93 Cal. 241, 27 Am. St. Rep. 186, 29 Pac. 54.

162 First Baptist Church v. Branham, 90 Cal. 22, 27 Pac. 60.

163 Mora v. LeRoy, 58 Cal. 8.

164 Carlson v. Curren, 48 Wash. 249, 93 Pac. 315.

165 Peralta v. Simon, 5 Cal. 313.

166 Birch v. Cooper, 136 Cal. 636,

69 Pac. 420; Larson v. Allen, 34 Wash. 113, 74 Pac. 1069.

167 Mitchell v. Knott, 43 Colo. 135, 95 Pac. 335.

168 Cal. Code Civ. Proc., § 749.

169 Blackburn v. Bucksport, 7 Cal. App. 649, 95 Pac. 668.

170 City of Port Townsend v. Lewis, 34 Wash. 413, 75 Pac. 982.

land under an executory contract from the state cannot acquire by adverse possession from the state until he is entitled to a deed from the state.¹⁷¹ Limitations will not run against an action to maintain a railroad right of way granted by Congress.¹⁷²

§ 6229. **Adverse possession.**—Adverse possession which will set the statute of limitations running is of two kinds: 1. Where possession is taken without color of title, but with intent to claim the fee against all comers; 2. Where possession is taken under a claim of title founded on a written instrument or judgment of a court of competent jurisdiction.¹⁷³ It is not necessary that one should actually live on or be on lands in order to maintain the actual possession necessary in a suit to quiet title.¹⁷⁴ Actual adverse and undisturbed possession of land for a period exceeding the time prescribed by statute for the enforcement of a right of entry gives to the possessor a right of undisturbed enjoyment equivalent to a perfect title.¹⁷⁵ An open, notorious, exclusive adverse possession for twenty years would operate to convey a complete title to the plaintiff, as much so as any written conveyance, a title of the highest character, the absolute dominion over it.¹⁷⁶

In Oregon, a naked adverse claim of title by adverse possession, not based on color of title, is not sufficient to entitle a claimant not in possession to institute a suit to quiet title, or to make defendant exhibit his title.¹⁷⁷ Ownership in fee carries with it the possession, in absence of actual entry and adverse possession

¹⁷¹ *Hamilton v. Flournoy*, 44 Or. 97, 74 Pac. 483.

¹⁷² *Oregon Short Line R. R. Co. v. Quigley*, 10 Idaho, 770, 80 Pac. 401.

¹⁷³ *Kimball v. Lohmas*, 31 Cal. 154. See, also, *Page v. Fowler*, 28 Cal. 605.

¹⁷⁴ *Maggs v. Morgan*, 30 Wash. 604, 71 Pac. 188.

¹⁷⁵ *Simson v. Eckstein*, 22 Cal. 580; *Le Roy v. Rogers*, 30 Cal. 229, 89 Am. Dec. 88. See, also, Cal. Code Civ. Proc., §§ 323-326.

¹⁷⁶ *Leffingwell v. Warren*, 2 Black, 605, 17 L. Ed. 261. To the same effect, see *Stokes v. Berry*, 2 Salk. 421; *Drayton v. Marshall*, Rice Eq. 385, 33 Am. Dec. 84; *Jackson v. Rightmyre*, 16 Johns. 327; *Bradstreet v.*

Huntington, 5 Pet. 438, 8 L. Ed. 436; *Thompson v. Green*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Chiles v. Jones*, 4 Dana (Ky.), 483; *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. Ed. 624. See *Arrington v. Liscoom*, 34 Cal. 381, 94 Am. Dec. 722, and cases there cited; *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458, 28 N. E. 15, 13 L. R. A. 206; *Harn v. Smith*, 79 Tex. 310, 23 Am. St. Rep. 340, 15 S. W. 240; *Parker v. Metzger*, 12 Or. 407, 7 Pac. 518; *Mitchell v. Campbell*, 19 Or. 198, 24 Pac. 455; *Thompson v. Felton*, 54 Cal. 547.

¹⁷⁷ *Muekle v. Good*, 45 Or. 230, 77 Pac. 743.

of another.¹⁷⁸ Such fee ownership may be derived from a sheriff's deed under foreclosure decree.¹⁷⁹ A right of prescription is limited by the character and extent of the user during the period requisite to acquire the right.¹⁸⁰

§ 6230. **Possession.**—Under the former California practice, a party out of possession could not maintain an action to quiet title. But section 738 of the present Code of Civil Procedure gives the right to prosecute the action generally, without reference to the question of possession.¹⁸¹ And the complaint need not aver that the plaintiff has been in possession of the land within a period of five years, or show that his cause of action is not barred by the statute of limitations. If it does not appear upon the face of the complaint that the action is barred, the question can only be presented by answer.¹⁸² In such action it is not necessary to prove that the defendants held the possession adversely to the plaintiffs, or that the plaintiffs were in possession thereof.¹⁸³ If the realty is not in the actual possession of any one, parties claiming title may maintain equitable action to try title thereto.¹⁸⁴ Possession by a tenant is the possession of the landlord.¹⁸⁵

§ 6231. **Possession of part.**—Where suit was brought under section 254 of the Practice Act to quiet title to a ranch, and plaintiff was in possession of a portion only, the suit was considered as brought to determine the title to that portion, and no injunction lay to restrain parties who were entire strangers to the title from selling that portion, as their conveyance would

¹⁷⁸ Mitchell v. Titus, 33 Colo. 385, 80 Pac. 1042; Christy v. Springs, 11 Okla. 710, 69 Pac. 864.

¹⁷⁹ Colo. Code Civ. Proc., § 255; Keener v. Wilkinson, 33 Colo. 445, 80 Pac. 1043.

¹⁸⁰ Chessman v. Hale, 31 Mont. 577, 79 Pac. 254, 68 L. R. A. 410.

¹⁸¹ People v. Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Hyde v. Redding, 74 Cal. 493, 16 Pac. 380. That it is in Washington, see Spithill v. Jones, 3 Wash. 290, 28 Pac. 531; Jackson v. Tatebo, 3 Wash. 456, 28 Pac. 916. See, also, Reiner v. Schroder, 146 Cal. 411, 80 Pac. 517.

¹⁸² Brusie v. Gates, 80 Cal. 462, 22 Pac. 284.

¹⁸³ Miller v. Lueo, 80 Cal. 257, 22 Pac. 195. That a court of equity will entertain a bill to remove a cloud of title to land in behalf of persons not in possession, if they have no adequate remedy at law, see Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326, 16 S. W. 497.

¹⁸⁴ Rohrer v. Snyder, 29 Wash. 199, 69 Pac. 748.

¹⁸⁵ Moran & Co. v. Palmer, 36 Wash. 684, 79 Pac. 476.

not cloud plaintiff's title. And if the grantees under such conveyance should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample.¹⁸⁶ Where the plaintiff for some years lived upon and occupied a part of the land, claiming the whole, while there was no other party in adverse possession of the part in controversy, this extended his possession to the bounds of the deed.¹⁸⁷

§ 6232. **Public lands, entry upon.**—When a party is authorized by an act of Congress generally to enter “in any land office,” etc., “a quantity of land not exceeding,” etc., he is limited in his selection to lands subject to location, and cannot take lands already sold or reserved from sale, or upon which a pre-emption or some other right has attached, under a law which is still in force, and which “covers” and protects it.¹⁸⁸ Congress, in the passage of the act of July 1, 1864, had in view the individual interest of *bona fide* settlers upon small parcels of public lands, as well as the common interests of a community of persons so contiguously settled as to justify the establishment of a town or city, and did not intend the act for the especial benefit of municipal corporations, and to authorize under its sanction an appropriation of private property to public use without compensation, or an arbitrary confiscation of rights of property for the benefit of municipal associations or corporations. So held in an action where the defendant, a corporation, had laid out a plaza, including a portion of the plaintiff's land, settled upon for private use.¹⁸⁹ To the same effect, held, in a case where the land was claimed by the corporation as a public street.¹⁹⁰

If neither plaintiff nor his predecessors ever occupied or filed a possessory claim to public land, a quiet-title action cannot be maintained.¹⁹¹ And one who has made a homestead filing and gone into possession of government land, but has not obtained title, cannot quiet title as against one claiming an interest therein.¹⁹² The location of mineral in a non-navigable stream running

¹⁸⁶ Curtis v. Sutter, 15 Cal. 259.

¹⁸⁷ Hicks v. Coleman, 25 Cal. 132, 85 Am. Dec. 103.

¹⁸⁸ Chotard v. Pope, 12 Wheat. 587, 6 L. Ed. 737; Lytle v. State of Arkansas, 9 How. 333, 13 L. Ed. 159; cited in Hutton v. Frisbie, 37 Cal. 475.

¹⁸⁹ Jones v. City of Petaluma, 38 Cal. 406.

¹⁹⁰ See Alemany v. City of Petaluma, 38 Cal. 553.

¹⁹¹ Branca v. Ferrin, 10 Idaho, 239, 77 Pac. 636.

¹⁹² Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

through land which has been patented without any reserve is of no avail to such locator, because no title remains in the government.¹⁹³

§ 6233. **Elements of adverse possession.**—In New Mexico, a person claiming ownership of land by limitations must have been in actual, visible, exclusive, hostile, and continued possession thereof for ten years;¹⁹⁴ in California, for five years.¹⁹⁵ The possession, to be adverse, must be open, visible, continuous, and exclusive, with a claim of ownership such as will notify parties seeking information on the subject that the premises are held against all titles and claimants.¹⁹⁶ A holding without color of title, in order to set the statute of limitations to running, must be actual, and evidenced by such acts of use as the land is adapted to.¹⁹⁷ A purchaser at a tax-sale cannot hold against a grantee of the original owner who has held possession against said purchaser for more than seven years.¹⁹⁸ In California, adverse possession, not founded on a written instrument, must show that claimant or his predecessors and grantors have paid all taxes levied and assessed on the land, that possession has been continuous and uninterrupted, and that it has been protected by a substantial inclosure, or that the land has been usually cultivated or improved.¹⁹⁹

§ 6234. **Necessary color of title.**—The statutes providing that adverse possession must be held either under title or color of title, or under a deed duly registered, precludes a defendant in ejectment from setting up possession for the statutory periods of three or five years as giving title by adverse possession as against his own deed to plaintiff.²⁰⁰ In Washington, paying taxes upon land held by one in possession without any color of

¹⁹³ Kirby v. Potter, 138 Cal. 686, 72 Pac. 338.

¹⁹⁴ Johnston v. City of Albuquerque, 12 N. Mex. 20, 72 Pac. 9.

¹⁹⁵ Cal. Code Civ. Proc., § 321; Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739.

¹⁹⁶ Wade v. Crouch, 14 Okla. 593, 78 Pac. 91.

¹⁹⁷ Hamilton v. Flournoy, 44 Or. 97, 74 Pac. 483.

¹⁹⁸ Crocker v. Dougherty, 139 Cal. 521, 73 Pac. 429.

¹⁹⁹ Nathan v. Dierssen, 146 Cal. 63, 79 Pac. 739; Dignan v. Nelson, 26 Utah, 186, 72 Pac. 936; Kline v. Stein, 30 Wash. 189, 70 Pac. 235; Biggart v. Evans, 36 Wash. 212, 73 Pac. 925.

²⁰⁰ Goldman v. Sotelo, 8 Ariz. 85, 68 Pac. 558; Tully v. Tully, 137 Cal. 60, 69 Pac. 700; Mann v. Mann, 141 Cal. 326, 74 Pac. 995.

title for the period of seven years does not give title.²⁰¹ The erection of cheap shanties upon land occupied by one claiming title, which is in litigation, is not such a disseisin as will render the occupation adverse.²⁰²

A sheriff's deed gives a color of title, though it includes in its description land not belonging to the judgment debtor.²⁰³ A verbal agreement accompanying a deed to certain lots, that land between the lots and the street, used as part of the street, should go with the lots, is sufficient to give color of title to support adverse possession.²⁰⁴ A conveyance which purports to convey, though it passes no actual title, still gives a color of title.²⁰⁵ One entering land under bond for a title does not hold by adverse possession until such a time as he agrees to forfeit and to quitclaim to the owner.²⁰⁶ A certificate of sale acquired by the purchaser at mortgage foreclosure constitutes color of title.²⁰⁷ And this is so where the foreclosure is upon the life tenancy only.²⁰⁸ The rule that the holder of the legal title is in constructive possession controls as against a transaction remote in time, upon which evidence is difficult to obtain, in which such lands were omitted from the description.²⁰⁹

§ 6235. **Beginning of adverse possession.**—Limitations as to a claim under a Mexican grant held in adverse possession do not begin to run until confirmed by the issue of the patent to claimants.²¹⁰ A claim arising from sheriff's sale dates from the receipt of the certificate of sale, and not from the deed pursuant thereto.²¹¹ Where a person has held, by a substantial fence and by ordinary cultivation, for a period of twenty years, the fact that he has not held for a period of seven years after the receipt of patent by his adverse claimant does not deprive him of his right of title by adverse possession.²¹²

²⁰¹ *City of Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982.

²⁰² *Blake v. Shriver*, 27 Wash. 593, 68 Pac. 330.

²⁰³ *Hamilton v. Flournoy*, 44 Or. 97, 74 Pac. 483.

²⁰⁴ *Hesser v. Siepman*, 35 Wash. 14, 76 Pac. 295.

²⁰⁵ *Schlageter v. Gude*, 30 Colo. 310, 70 Pac. 428.

²⁰⁶ *Brownlee v. Williams*, 32 Colo. 502, 77 Pac. 250.

²⁰⁷ *Olson v. Howard*, 38 Wash. 15, 80 Pac. 170; *Cox v. Tompkinson*, 39 Wash. 70, 80 Pac. 1005.

²⁰⁸ *Webb v. Winter*, 135 Cal. 443, 67 Pac. 691.

²⁰⁹ *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776.

²¹⁰ *Adams v. Hopkins (Cal.)*, 69 Pac. 228.

²¹¹ *Philadelphia Mortg. etc. Co. v. Palmer*, 32 Wash. 455, 73 Pac. 501.

²¹² *Toltee Ranch Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876.

Successive possessions may be tacked on to each other upon proof that the particular premises claimed were included in the transfer.²¹³

§ 6236. Hostile possession.—Open, notorious, uninterrupted, and peaceable possession of land under a claim of right will be presumed to have been adverse from its inception as to the holder of the legal title, though not in its character hostile.²¹⁴ There must have been an intention for the period required to claim in hostility to the title of the real owner.²¹⁵ Possession by the grantee of land reserved by the grantor adjoining a street does not extinguish title in such grantor, unless such possession is shown to be adverse.²¹⁶ A city occupying part of a lot for the site of an engine-house cannot claim the lot by right of adverse possession if it has been assessing the lot to the owner of the legal title and collecting the taxes from him.²¹⁷

§ 6237. Amicable possession becoming adverse.—A railroad company which enters and occupies a strip of land with permission of a city cannot thereafter claim adverse possession thereto.²¹⁸ And the same rule applies if the railroad company is to erect a station and stop trains upon the land given to it for use.²¹⁹ When the relation of landlord and tenant has existed, possession of the tenant is deemed possession of the landlord until the expiration of five years from the time of the last payment of rent, though the tenant may have claimed to hold adversely.²²⁰ A cotenant receiving a deed to the premises from his cotenants is not thereupon presumed to set up an adverse claim against the landlord.²²¹ Mere continuance of occupancy by the legal owner of land is sufficient as against the holder of a tax-certificate entitling him to a deed.²²² But the fact that the father, who had conveyed title to his children, remained in possession for more than eight

²¹³ *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776.

²¹⁴ *Toltee Ranch Co. v. Babcock*, 24 Utah, 183, 66 Pac. 876; affirmed, 191 U. S. 542, 48 L. Ed. 294, 24 Sup. Ct. 169.

²¹⁵ *City of Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982.

²¹⁶ *Evans v. Welch*, 29 Colo. 355, 68 Pac. 776.

²¹⁷ *Hesse v. Strode*, 10 Idaho, 250, 77 Pac. 634.

²¹⁸ *Oregon City v. Oregon etc. R. Co.*, 44 Or. 165, 74 Pac. 924.

²¹⁹ *Southern California R. R. Co. v. Slauson (Cal.)*, 68 Pac. 107.

²²⁰ *Cal. Code Civ. Proc.*, § 326.

²²¹ *Allen v. McKay & Co. (Cal.)*, 70 Pac. 8.

²²² *Crocker v. Dougherty*, 139 Cal. 521, 73 Pac. 429.

years, up to the time of his death, does not divest them of their title.²²³ However, where the land is vacant and unimproved, such a grantor may acquire back the title by adverse possession.²²⁴

§ 6238. **Possession by mistake.**—Entry upon land of another, as public land, by mistake does not in any degree dispossess the true owner of title.²²⁵ So the making of improvements upon adjoining land, or inclosing it by fences, under the mistake that one is making them upon his own land, does not constitute an adverse possession.²²⁶ One who buys a lot inclosed by a fence which erroneously includes a strip of land twenty-one inches wide, who improves such land, and builds so that the drip of the eaves of the house fall upon such land, acquires title thereto by adverse possession.²²⁷ Where a survey is made and a boundary fence built, the one claiming such line as the true line, and repudiating subsequent surveys, is holding by adverse possession.²²⁸

§ 6239. **Continuous possession.**—Breaches in an inclosure do not destroy adverse possession unless they are left for such length of time as to show that the occupant does not intend to continue the exclusive use of the premises.²²⁹ Where a person receives a deed to certain premises, and takes possession thereof, but by mistake several acres are omitted in the description, title to the omitted portion is fully acquired by adverse possession after the statutory time from the receipt of the first deed.²³⁰

A right of way acquired by prescription is not affected by a temporary interruption of the use, owing to the obstruction of the way by a third person on other land.²³¹ Filing a petition in bankruptcy does not interrupt the running of the period of limitations for the possession of property claimed as a homestead.²³²

²²³ Tully v. Tully, 137 Cal. 60, 69 Pac. 700.

²²⁴ Bird v. Whetstone, 71 Kan. 430, 80 Pac. 942.

²²⁵ Yesler's Estate v. Holmes, 39 Wash. 34, 80 Pac. 851.

²²⁶ Suksdorf v. Humphrey, 36 Wash. 1, 77 Pac. 1071; Brownlee v. Williams, 32 Colo. 502, 77 Pac. 250.

²²⁷ Erickson v. Murlin, 39 Wash. 43, 80 Pac. 853.

²²⁸ Gist v. Doke, 42 Or. 225, 70 Pac. 704.

²²⁹ Jones v. Hodges, 146 Cal. 160, 79 Pac. 869.

²³⁰ West v. Edwards, 41 Or. 609, 69 Pac. 992.

²³¹ Cavanaugh v. Wholey, 143 Cal. 164, 76 Pac. 979.

²³² Harris v. Duarte, 141 Cal. 497, 70 Pac. 298, 75 Pac. 58.

§ 6240. **Possession pleaded.**—In California, under the code sections requiring adverse possession to be actual, open, and notorious, and in hostility to plaintiff's title, and under a claim of title, exclusive of any other right, which occupation shall have been continuous and uninterrupted for more than five years,²³³ and under code section 325, requiring payment of taxes assessed, a plea of prescriptive title is not defective for failure to allege that the possession was peaceable.²³⁴ An allegation that plaintiff "is now, and she and her grantors have been, in the actual, open, notorious, and adverse possession under color of title and claim of right for more than ten years last past," is a sufficient allegation of adverse possession.²³⁵ The facts showing the existence of the right should be pleaded.²³⁶ An allegation that defendant holds under a warranty deed "from the owner," and had paid taxes, etc., sufficiently alleges a holding under color of title, as against a general demurrer.²³⁷

§ 6241. **Rescission of contract—Return of purchase money.**—Where the purchaser of land pays a deposit on account of the sale, under an agreement with the vendor by which he was to have the deposit returned to him if the title should not be satisfactory, and it appears that the purchaser is entitled to a return of the deposit, the vendor cannot have his title quieted against the purchaser until he first restores the money received.²³⁸ Where the contract of sale provides for a rescission of the contract by the vendor upon default of the purchaser in payment of purchase money, in an action to quiet title by the vendor the facts entitling the defendants to a return of the purchase money must be specifically pleaded; and if it appears that the vendor was ready and willing to comply with his contract, and the purchaser or those claiming under him were not able or willing to comply with the contract of purchase, the vendor may treat the contract as abandoned, and maintain his action to quiet title, without a return of the purchase money received.²³⁹ An action to remove

²³³ Cal. Code Civ. Proc., §§ 322-324.

²³⁴ Montecito Valley Water Co. v. City of Santa Barbara, 144 Cal. 578, 77 Pac. 1113.

²³⁵ Hesser v. Siepmann, 35 Wash. 14, 76 Pac. 295.

²³⁶ Coleman v. Hines, 24 Utah, 360, 67 Pac. 1122.

²³⁷ Jones v. Herrick, 35 Wash. 434, 77 Pac. 798.

²³⁸ Benson v. Shotwell, 87 Cal. 49, 25 Pac. 249.

²³⁹ Stratton v. California Land etc. Co., 86 Cal. 353, 24 Pac. 1065.

a cloud on plaintiff's title, on account of an option given defendant to purchase, which has been declared forfeited before commencement of the action, is not an action to declare a forfeiture.²⁴⁰ Where plaintiff sells the same land on contract to two different vendees, and thereafter sues one to quiet title, the other vendee is a necessary party.²⁴¹

§ 6242. **Adverse possession—Payment of taxes.**—In pleading a title acquired by adverse possession, the claimant need not allege that the taxes on the land have been paid, as required by section 325 of the California Code of Civil Procedure. The fact that the taxes have been paid, if essential, is a matter of evidence only, and not of pleading.²⁴² Payment of taxes after suit brought will give no title.²⁴³

§ 6243. **Who bound by judgment.**—One who purchases from the defendant during the pendency of an action to quiet title, in which action a *lis pendens* has been filed, is bound by the judgment rendered therein.²⁴⁴ Although a decree quieting title is not *in rem*, strictly speaking, it fixes and settles the title to real estate, and to that extent partakes of the nature of a judgment *in rem*.²⁴⁵

§ 6244. **Defense of equal equities.**—Where in an action to quiet title to land both parties show an equal equity, but one has also the legal title, he who has the legal title must prevail.²⁴⁶

§ 6245. **Insufficient defense.**—Where the defendant in an action to quiet title to a mining claim on the public lands set up in a supplemental answer both abandonment and forfeiture by the plaintiffs of their asserted title and possession to said claim after suit commenced, but failed to set up any subsequently acquired rights therein by himself, it was held that said matters were unavailing to defendant as defenses to the action.²⁴⁷ The fact

240 Merk v. Bowery Min. Co., 31 Mont. 298, 78 Pac. 519.

241 Birch v. Cooper, 136 Cal. 636, 69 Pac. 420; Larson v. Allen, 34 Wash. 113, 74 Pac. 1069.

242 Ball v. Nichols, 73 Cal. 193, 14 Pac. 831.

243 Vietzen v. Otis, 46 Wash. 402, 90 Pac. 264.

244 Haynes v. Calderwood, 23 Cal. 409.

245 Fredericks v. Judah, 73 Cal. 604, 15 Pac. 305.

246 Maina v. Elliott, 51 Cal. 8.

247 Pralus v. Pacific G. & S. M. Co., 35 Cal. 30.

that defendant's denials are insufficient does not entitle plaintiff to judgment on the pleadings, if defendant has set up a sufficient affirmative defense in his answer or cross-complaint.²⁴⁸

§ 6246. **Possession.**—If the answer in an action to quiet title admits plaintiff's ownership in fee simple and possession, the rightfulness of the possession follows the admission, and even if plaintiff went into possession by leave of defendant's tenant, he is not estopped from denying defendant's title.²⁴⁹ If a complaint to quiet title avers plaintiff's possession, and the answer admits the averment, this admission is not avoided by a special averment that plaintiff obtained possession by collusion with defendant's tenant.²⁵⁰ In an action to determine an adverse claim, the objection that the plaintiff had not at the commencement of the action actual possession of the premises must be distinctly taken by the answer, and before going to trial on the merits, or it will be waived.²⁵¹ A defendant seeking to recover possession makes a good defense by setting out in his answer and cross-complaint the facts which show him to be the owner and entitled to possession, though he does not plead in the exact formula of the code.²⁵²

§ 6247. **Cross-complaint.**—In an action to quiet title, affirmative relief must be sought by cross-complaint.²⁵³ A cross-complaint is proper when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.²⁵⁴ Defendant in an action at law may file a cross-complaint in equity to have the conveyance vacated on the ground of fraud.²⁵⁵ A counterclaim must arise out of a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.²⁵⁶ A cross-complaint is permitted where defendant asks affirmative relief relating to or dependent on a contract or transaction on which

²⁴⁸ McCroskey v. Mills, 32 Colo. 271, 75 Pac. 910.

²⁴⁹ Reed v. Calderwood, 32 Cal. 109.

²⁵⁰ Id.

²⁵¹ Jones v. Collins, 16 Wis. 594.

²⁵² McCroskey v. Mills, 32 Colo. 271, 75 Pac. 910.

²⁵³ Bacon v. Rice, 14 Idaho, 107, 93 Pac. 511.

²⁵⁴ Winter v. McMillan, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407.

²⁵⁵ Wood v. Fisk, 45 Or. 276, 77 Pac. 128, 738; Or. B. & C. Codes, § 391.

²⁵⁶ Cal. Code Civ. Proc., § 438.

the action is brought, or affecting the property to which the action relates.²⁵⁷ The claim of defendant for damages because plaintiff refused to allow him to proceed in digging a well upon the premises, the payment for which was to be proportioned to the amount of flow obtained, is not a proper foundation for a cross-complaint in an action to quiet title.²⁵⁸ In an action under the statute of North Dakota²⁵⁹ to determine adverse "estates and interests" in real estate, the defendant may, by answer, in addition to a denial of the plaintiff's title, allege facts which show title in himself, and ask that such title be quieted and confirmed by the court. Such new matter, when properly pleaded, constitutes a counterclaim within the meaning of the statute,²⁶⁰ and constitutes a cause of action in favor of defendant, and against plaintiff, which is "connected with the subject of the action." To such counterclaim, if not demurred to, the plaintiff must respond by a reply, and, if none is served, the defendant may move for judgment.²⁶¹

Defendant, a purchaser at a foreclosure of mortgage sale, need not in his cross-complaint allege that plaintiff was a party to the foreclosure suit. He is an innocent purchaser for value, bound only by such outstanding unrecorded liens as he has actual notice of.²⁶²

§ 6248. **Abatement of action.**—The pendency of an action to quiet title to land will not abate a subsequent action between the same parties to recover possession of the same land in which the same facts are litigated.²⁶³ A former judgment in ejectment is not conclusive as to title as against a defendant found not to be in possession.²⁶⁴

§ 6249. **Replication, or reply.**—The statement of new matter in the answer in avoidance or in defense must at trial be deemed controverted by the opposite party.²⁶⁵

²⁵⁷ Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40.

²⁵⁸ Id.

²⁵⁹ N. Dak. Comp. Laws, § 5449.

²⁶⁰ N. Dak. Comp. Laws, § 4915, subd. 1.

²⁶¹ Power v. Bowdle, 3 N. Dak. 107, 44 Am. St. Rep. 511, 54 N. W. 404, 21 L. R. A. 328.

²⁶² Jones v. Herrick, 35 Wash. 434, 77 Pac. 798.

²⁶³ Bolton v. Landers (No. 1), 27 Cal. 104.

²⁶⁴ Loftus v. Marshall, 134 Cal. 394, 86 Am. St. Rep. 236, 66 Pac. 571; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186.

²⁶⁵ Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664.

§ 6250. **Limitations.**—Any person claiming title or right of possession must show himself or his predecessor to have been seised or possessed of the premises within five years before commencement of the act complained of, and no entry upon land is deemed sufficient or valid as a claim, unless action thereon be commenced within one year after such entry, and within five years from the time when the right to make it descended or accrued.^{265a}

§ 6251. **Special answer.**—The answer need only deny plaintiff's title.²⁶⁶ But in order to set up an equitable title against plaintiff's legal title, it should be pleaded.²⁶⁷ The defendant in an answer to quiet title may specially plead that the plaintiff has only a lien, or any interest less than he claims, and that the defendant has an equitable title, or any interest in the land, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly.²⁶⁸

§ 6252. **General denial.**—A general denial in an answer to an unverified complaint by an administrator in an action to quiet title puts in issue the plaintiff's title and position as administrator, and a demurrer to such answer cannot properly be sustained.²⁶⁹

§ 6253. **Another action pending.**—An allegation in the answer that another action is pending between the parties for dissolution of a copartnership and settlement of accounts is immaterial, and cannot bar the right of the plaintiff to have his title or interest in the property in controversy determined in an action to quiet title.²⁷⁰

§ 6254. **Burden of proof.**—In an action to quiet title, the burden rests upon the plaintiff to show title in himself; and if he fails to make out a case, he is not entitled to recover.²⁷¹ Proof

^{265a} Cal. Code Civ. Proc., §§ 318-320.

²⁶⁶ *Butterfield v. Graves*, 138 Cal. 155, 71 Pac. 510; *Williams v. City of San Pedro*, 153 Cal. 44, 94 Pac. 234; *Peterson v. Plunkett*, 4 Cal. App. 302, 88 Pac. 283.

²⁶⁷ *United Land Assoc. v. Pacific P. P. F.*, Vol IV—18

Imp. Co., 139 Cal. 370, 69 Pac. 1064, 72 Pac. 988.

²⁶⁸ *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Winter v. McMillan*, 87 Cal. 256, 22 Am. St. Rep. 243, 25 Pac. 407.

that plaintiff has legal title and defendant an equitable title entitling him to a conveyance does not quiet title in defendant.²⁷²

§ 6255. **Judgment, or decree.**—Though the complaint claims an ownership in fee to a ditch, yet the court may find a right in the nature of an easement,²⁷³ or an undivided half-interest.²⁷⁴ A decree compelling the cancellation of assessment liens of record on account of lapse of time should not make such cancellation indicate a payment of the assessments.²⁷⁵ The court should in its decree declare and define the interests of the respective parties as established by the evidence.²⁷⁶ The general prayer is sufficient to support an injunction, if the facts warrant it.²⁷⁷ A perpetual injunction against asserting any claim to the property, being merely ancillary to the principal relief, and unnecessary to make it effectual, is not prejudicial to defendant.²⁷⁸ A decree quieting title cannot be given where no conflict of claims is shown.²⁷⁹

FORMS IN QUIET-TITLE.

§ 6256. Complaint on claims to real property.

Form No. 1719.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. is now deceased, and at the time of his death was seised in fee simple of certain real property in the town of . . . , county of . . . , bounded as follows: [Description.]

II. That in his lifetime the said A. B. made and published his last will and testament, whereby he devised the plaintiff all his said property.

III. That the said A. B. died on the . . . day of . . . , 19. . . , at . . . [etc., alleging probate of will and distribution to plaintiff.]

²⁷² Robinson v. Muir, 151 Cal. 118, 90 Pac. 521.

²⁷³ Bashore v. Mooney, 4 Cal. App. 276, 87 Pac. 553.

²⁷⁴ Tabler v. Peverill, 4 Cal. App. 671, 88 Pac. 994.

²⁷⁵ Cushing v. City of Spokane, 45 Wash. 193, 122 Am. St. Rep. 890, 87 Pac. 1121.

²⁷⁶ Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121.

²⁷⁷ City of Los Angeles v. Los Angeles Farming etc. Co., 152 Cal. 645, 93 Pac. 869, 1135.

²⁷⁸ Dorris v. McManus, 3 Cal. App. 576, 86 Pac. 909; Richey v. Bues, 31 Utah, 262, 87 Pac. 903.

²⁷⁹ Mason v. Long, 49 Wash. 18, 94 Pac. 646.

IV. That the said property is now, and has been, for the . . . years last past, in the actual possession of the plaintiff [or, is now, and has been, for the . . . years last past, in the actual possession of the plaintiff, and was during the . . . years immediately preceding that period, in the actual possession of the said deceased].

V. That the defendant unjustly claims an estate or interest [state what] in said property.

Wherefore, the plaintiff demands judgment:

1. That the defendant be forever barred from all claim to any estate of inheritance or freehold in said property.

§ 6257. The same—Another form.

Form No. 1720.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is now, and for a long time hitherto has been, the owner and in the possession of that certain lot, piece, or parcel of land, situated, lying, and being in the county of . . . , state of . . . , and bounded and described as follows, to-wit: [Describe property.]

II. That the said defendant claims an estate or interest therein adverse to the said plaintiff.

III. That the claim of the said defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof.

Wherefore, the plaintiff prays:

1. That the defendant may be required to set forth the nature of his claim; and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said land and premises; and that the title of plaintiff is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land and premises adverse to the plaintiff, and for such other relief as to this honorable court shall seem meet and agreeable to equity, and for his costs of suit.

§ 6258. Complaint—Claim based on execution sale.

Form No. 1721.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., he commenced an action in the [state the court], against the said C. D. and one E. F., and afterwards, to-wit, on the . . . day of . . . , 19.., by the consideration and judgment of the said [superior] court, the plaintiff recovered in said action a judgment against the defendants C. D. and E. F., for the sum of . . . dollars damages and costs.

II. That on the . . . day of . . . , 19.., a writ of execution was issued on said judgment in due form of law, directed and delivered to G. H., the then sheriff of . . . , to be executed.

III. That by virtue of such execution the said sheriff did levy on the lands and real estate hereinafter described as the lands and property of the said defendant C. D., and after giving and publishing the notice, and doing all things required by law, did on the . . . day of . . . , 19.., legally sell the said lands and premises, and all the right, title, and interest which the said defendant C. D. had therein, on the . . . day of . . . , 19.., and the above-named plaintiff being the highest bidder at such sale became the legal purchaser thereof.

IV. That the said G. H., as sheriff aforesaid, duly executed and delivered to plaintiff a certificate of such sale, as required by law, and after the time for redemption had expired, and neither the said C. D. nor any other person having redeemed the premises from such sale, to-wit, on the . . . day of . . . , 19.., the said G. H., as sheriff as aforesaid, made, executed, and delivered to this plaintiff a deed of conveyance of said premises as required by law.

V. That the following is a description of the said lands and premises: [here describe them]; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

VI. And the plaintiff further says, that at the time of the rendering of the above-named judgment, and for several years prior thereto, and at the time of said sale, the said defendant C. D. had been and was the real owner of said lands and premises.

VII. That on the . . . day of . . . , 19.., and after the commencement of and pending the suit of the plaintiff against said

C. D. and E. F. hereinabove referred to, the said C. D. was largely indebted, and, amongst other persons, was indebted to the firm of I. K. and company, and also to the plaintiff, on the demands for which the above judgment was rendered.

VIII. That, as the plaintiff is informed and believes, and so charges the truth to be, with a view to conceal his said property from plaintiff and other creditors, and to hinder and delay and defraud them in the collection of their debts and demands, he, the said defendant C. D., made and executed to one L. M. a conveyance of the said above-described premises, so purchased by said plaintiff as above set forth.

IX. And the plaintiff is informed and believes, and therefore avers, that said conveyance was without any consideration moving from said L. M. or any other person, but was wholly voluntary, sham, and fictitious; and that said L. M. held said premises under said conveyance, in secret trust for the said C. D., until the conveyance by him as next hereinafter stated.

X. That on the . . . day of . . . , 19.., the said L. M., at the request, as plaintiff believes and charges, of the said C. D., and without any consideration moving therefor, made and executed a conveyance of said premises to one O. D., who is the father of the said C. D.; and that, as plaintiff believes and charges, the said O. D. paid no valuable consideration, but took and held the same in secret trust for the said C. D., and with the intent to aid and abet the said C. D. in hindering, delaying, and defrauding his creditors, and especially this plaintiff.

XI. And the plaintiff further avers that by virtue of the sale and purchase by him as above stated, and the conveyance from said G. H., as sheriff, he became, and was, and is the owner of said premises; that the conveyance from said C. D. to said L. M., and from said L. M. to said O. D., were and are fraudulent and void, and operate only as a cloud on the title of said plaintiff.

Wherefore, the plaintiff prays that it may be decreed:

1. That said defendant C. D. was the real owner of said premises at the time of issuing said execution and sale, and the conveyance by the said sheriff to said plaintiff, and that said defendant O. D., at the same period, held the same in secret and fraudulent trust for said C. D. as aforesaid; and further, that the plaintiff be adjudged and decreed to be the legal owner of said premises, and that the said conveyance from said C. D. to

said L. M., and from said L. M. to said O. D., may be decreed to be fraudulent and void, and of no force or effect.

2. That the said defendants C. D. and O. D. may be decreed to make, execute, and deliver to this plaintiff a deed of conveyance of all the right, title, and interest in said premises; or that some person may be appointed by this honorable court to do it for them, and that the plaintiff may have such further or other relief as the nature of the case may require; and in the mean time that the said defendant may be enjoined from selling, conveying, transferring, mortgaging, incumbering, or otherwise interfering or meddling with said premises, and for costs.

§ 6259. Complaint to remove mortgage which is cloud upon title.

Form No. 1722.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is the owner in fee of the following described premises, situated in [description].

II. [Allege the making of the mortgage, or other apparent lien, stating facts which show that on its face it appears valid, and that in fact it is void.]

III. That said mortgage was, on the . . . day of . . . , 19.., duly recorded in the office of the recorder of said county, in book . . . of mortgages, page . . . , and still remains unsatisfied of record, and is a cloud upon the plaintiff's title.

Wherefore, the plaintiff demands judgment:

1. That the defendant give up said mortgage to be canceled.
2. That the same be satisfied of record.
3. And for the costs of this action.

§ 6260. Complaint by owner in statutory action to set aside tax claims.

Form No. 1723.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff is the owner in fee [and in possession] of the following premises: [Describe same.]

II. [If the premises are vacant:] That said premises are vacant and unoccupied.

III. That the defendant claims a title or interest in said prem-

ises, or lien thereon adverse to the plaintiff, by and through certain tax-certificates or tax-deeds, which in truth and in fact are invalid.

Wherefore, plaintiff demands judgment, that said tax-certificates or tax-deeds be adjudged void, and that the cloud thereby created upon plaintiff's title be removed, and that plaintiff recover the costs and disbursements of this action.

§ 6261. Complaint in statutory action by tax-title claimant to bar original owners.

Form No. 1724.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff claims title to the following described lands and premises, to-wit: [describe same], under and by virtue of a certain tax-deed made, executed, and delivered to the plaintiff pursuant to law, on the . . . day of . . . , 19.., by the tax-collector of said county of . . . [or other officer, as the fact may be], of which deed a true copy is hereto annexed, marked "Exhibit A," and made a part of this complaint.

II. That the defendants C. D. and E. F. were the former owners of said tracts described in said deed, and the defendants G. H. and J. K. claim under said former owners, to-wit: The said G. H. claims [describe parcel] under the defendant C. D., and the defendant J. K. claims [describe parcel] under the defendant E. F.

III. That the plaintiff has paid in taxes on said premises as follows: [Here specify amount of taxes paid by plaintiff, including redemptions, stating dates of payment.]

Wherefore, the plaintiff demands judgment against said defendants, that they be barred of all right, title, interest, or claim in said lands, or any part thereof, and for the costs and disbursements of this action.

[Annex copy of deed.]

§ 6262. Complaint in equity by owner to set aside illegal tax or assessment.

Form No. 1725.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege ownership of premises in plaintiff.]

II. [Allege corporate character of city or other municipal corporation which has attempted to levy the tax.]

III. [Allege levy of tax or assessment upon the plaintiff's lands, and issuance of tax-certificates or deeds, if any; the holder should be made a defendant.]

IV. [Allege with certainty and particularity the defects or illegalities in the levy which are relied on to avoid the tax.]

V. [Allege tender of amount equitably due, if one has been made; or, otherwise, allege willingness to pay same unless the land be exempt or the tax has been in fact paid, or the tax was without jurisdiction.]

[Demand of judgment for cancellation of tax and certificates or deeds, with prayer for injunction, if necessary.]

§ 6263. Answer containing special denial, plea of statute of limitations, and cross-complaint for quieting title.

Form No. 1726.

[TITLE.]

The defendant answers to the complaint:

First. For a first defense [deny specially each allegation].

Second. And for a further and separate answer and defense:

I. The defendant alleges that the said plaintiffs claim that they are owners of said lots of land and premises in complaint and hereinafter described, and claim title thereto as heirs and devisees of deceased.

II. That said R. P., in his lifetime, to-wit, in the month of . . . , 19.., conveyed, by a good and sufficient deed, to defendant's predecessors or grantors, in fee, the lots or tracts of land hereinafter described, and that after the making and delivery of said deed, said R. P. never had, nor have the plaintiffs or any of them since had, nor have they now, either as heirs or devisees of said R. P., or otherwise, any right, title, or interest in or to the said lands, or any part thereof.

III. That the said deeds so duly executed by said R. P., whereby the title of said R. P. to said lots of land was vested in this defendant's predecessors or grantors aforesaid, were never recorded or filed for record, and were destroyed by fire on or about the . . . day of . . . , 19..

Third. And for a further and separate answer and defense:

The defendant alleges that he has been in the quiet and peace-

able possession of the pieces or lots of land hereinafter described, holding and claiming the same adversely to the said plaintiffs, and adversely to all other persons, for more than five years before the commencement of this suit; and that neither the plaintiffs nor any of them, or either of their ancestors, predecessors or grantors, was or were seised or possessed of the said lots of land, or either of them, or any portion of the same, within five years before the commencement of this action.

Fourth. And for the cross-complaint, the defendant alleges:

I. That he is now, and was at the commencement of this suit, and for more than five years before that time, and from thence up to that time had been, in the quiet and peaceable possession and occupancy of all those certain lots or pieces of land situate, lying, and being in the city and county of . . . , being the same lots in the complaint described, and bounded and described as follows, to-wit: [Give description of land.]

II. That the said plaintiffs have not, nor have either or any of them, any right, title, interest, or right of possession in or to the said described premises, or any part thereof; that the said plaintiffs claim to have some right, title, interest, or right of possession in or to the said above-described pieces and lots of land adverse to defendant, and claim that they are owners thereof, and claim title thereto, as heirs and devisees of R. P., deceased, as hereinbefore, to-wit, in the second averment of the answer herein, is set out.

III. That said R. P. duly conveyed to defendant's predecessors or grantors, in fee, the lots or tracts of land hereinbefore described, as in the second averment of said answer set out; and defendant alleges that the said claim of the said plaintiffs to said lots of land, whatever it may be, is against the rights of this defendant, and is without foundation, and is a cloud upon defendant's title to said land and premises.

Wherefore, defendant prays, that the said plaintiffs, and every one of them, be adjudged to produce and bring forward any and all claims which they or either of them have or make upon the above-described lots, or any part thereof; and that the same may, by the decree of this court, be declared invalid, and of no effect, and that the said plaintiffs be perpetually restrained and enjoined from setting up or making any claim to or upon the said premises; and that all such claims be quieted; and that this defendant be declared and adjudged the owner and of right in

the possession of the said premises, and every part thereof, against any claim of the said plaintiffs, or any of them; and that plaintiffs be adjudged to execute to this defendant a deed for said lots hereinbefore described, and in default so to do that a commissioner be appointed by this honorable court for that purpose; and for such other or further order, decree, or judgment as may be just and equitable to defendant.

§ 6264. Disclaimer.

Form No. 1727.

[TITLE.]

The defendant answers to the complaint:

That he disclaims all right, title, and claim to any estate of inheritance or of freehold in the premises described.

§ 6265. Estoppel.

Form No. 1728.

[TITLE.]

The defendant answers to the complaint:

That plaintiff ought not to be admitted to allege [here state the matter to which the estoppel is interposed—e. g.] that the said premises belonged to C. D., because he alleges [here state the subject-matter of the estoppel—e. g.] that the plaintiff, on or about the . . . day of . . . , 19.., conveyed said premises to the defendant by deed, containing a full covenant of warranty. [State facts as they exist.]

§ 6266. Equitable estate in defendant.

Form No. 1729.

[TITLE.]

The defendant answers to the complaint:

First. For a first defense:

I. [Deny title in plaintiff.]

Second. And as an equitable defense to said action, and as a cross-complaint therein, the defendant alleges:

I. That on the . . . day of . . . , 19.., the plaintiff executed and delivered to the defendant his agreement in writing, for the sale and conveyance to the defendant of the premises described in the complaint, a copy of which agreement is as follows: [Copy of the agreement.]

II. That the defendant fully performed all the conditions of said agreement on his part, yet the said plaintiff has not conveyed the said premises to the defendant, but to do so hath hitherto, and still does, neglect and refuse, though often requested thereto.

Wherefore, the defendant demands, that the plaintiff be adjudged to convey said premises to the defendant, in fee, by deed, with covenants, in pursuance of said agreement, and be enjoined from the further prosecution of this action.

§ 6267. Lis pendens, quiet-title.

Form No. 1730.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the county of . . . , state of California, by the above-named plaintiff against the above-named defendants, to quiet title to the premises and real estate in the complaint in the said action and hereinafter described, and to determine all and every claim, estate, or interest therein of said defendants, or either or any of them, adverse to the said plaintiff; and the premises affected by this suit are situated in the said . . . county, and are bounded and described as follows, to-wit: [Describe premises.]

§ 6268. Judgment quieting title to lands.

Form No. 1731.

[TITLE.]

[Recitals showing trial of action and findings and filing of notice of pendency of action, and continuing:]

It is adjudged, that the plaintiff was at the time of the commencement of this action, and now is, the owner absolute in fee simple of the premises hereinafter described, and his right and interest in said premises as such owner in fee simple is hereby declared and established.

It is further adjudged, that the defendant C. D., and all persons claiming under him subsequent to the filing of the notice of the pendency of this action, to-wit, . . . , 19.., be and they are hereby forever barred from any and all claim of right or title to the said premises or lien thereon, or any part thereof.

[That within thirty days after notice of the entry of this judgment the defendant execute and deliver to the plaintiff, under

his hand and seal, and duly witnessed and acknowledged, a release to the plaintiff of all claim in and to said premises.]

That the plaintiff do have and recover of the defendant his costs and disbursements, herein taxed at . . . dollars.

The following is a description of the lands affected by this judgment: [Describe same.]

J. K., Judge.

CHAPTER CXLVI.

EJECTMENT.

§ 6269. **Nature of.**—Ejectment is a form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained, to regain the possession of real property, with damages for the unlawful detention. It may be brought upon a right to an estate in fee simple, fee-tail, for life, or for years, if only there be a right of entry and possession in the plaintiff. Plaintiff must recover on the strength of his own title, and cannot rely on the weakness of the defendant's.¹ Where plaintiff has a remedy by ejectment, a bill in equity will not lie.² Title in plaintiff, possession by defendant, and withholding of same from plaintiff make out a case in ejectment.³

§ 6270. **Color of title.**—Color of title is that which in appearance is a title, but which in reality is no title. It is that which the law will consider *prima facie* a good title, but which, by reason of some defect, not appearing on its face, does not in fact amount to title. An absolute nullity, as a void deed or judgment, will not constitute a color of title.⁴ Plaintiff must recover, if at all, upon the strength of his own title.⁵

§ 6271. **Conveyance pending suit.**—The conveyance of the demanded premises by plaintiff in ejectment, pending the suit, to a person not a party to the action does not necessarily defeat the action.⁶

§ 6272. **Damages.**—In Wisconsin, the damages in ejectment which the plaintiff is entitled to recover include only the rents

1 Bouvier's Law Dict.; Harrison v. Gallegos, 13 N. Mex. 1, 79 Pac. 300; George v. Columbia etc. R. R. Co., 38 Wash. 480, 80 Pac. 767; Bothwell v. Denver Union Stock Co., 39 Colo. 221, 90 Pac. 1127; Bryant v. Pacific Iron etc. Works, 48 Wash. 574, 94 Pac. 110.

2 Lasswell v. Kitt, 11 N. Mex. 459, 70 Pac. 561.

3 Froman v. Madden, 13 Idaho, 138, 88 Pac. 894; Jennings v. Brown, 20

Okla. 294, 94 Pac. 557; Cottrell v. Pickering, 32 Utah, 62, 88 Pac. 696, 10 L. R. A. (N. S.) 404.

4 Bernal v. Gleim, 33 Cal. 668.

5 Harrison v. Gallegos, 13 N. Mex. 1, 79 Pac. 300; George v. Columbia etc. R. R. Co., 38 Wash. 480, 80 Pac. 767; Humphries v. Sorensen, 33 Wash. 563, 74 Pac. 690; Bothwell v. Denver Union Stockyard Co., 39 Colo. 221, 90 Pac. 1127.

6 Barstow v. Newman, 34 Cal. 90.

and profits, and not damages for injuries done to the premises.⁷ It is otherwise in California, where damages also may be recovered in the same action. Where damages for use and occupation prior to the commencement of the action are claimed, the plaintiff should state the title of the plaintiff as existing at some prior date, designating it, and as continuing up to the commencement of the action, and the entry of the defendant at some date subsequent to that of the alleged title as in this form.⁸ Where there is no other proof of ouster than a denial of plaintiff's title in the answer, the plaintiff can only recover damages from the date of the commencement of the suit.⁹ It is error to award damages where none are alleged in the complaint.¹⁰ Where the complaint in ejectment contains no allegation of special damage, the damages recoverable cannot include the value of the use of the premises by the defendant.¹¹ Defendants merely being enjoined from selling any ore on the premises pending litigation are not damaged on the theory that it prevents working the mine.¹²

§ 6273. **Constructive possession.**—A party who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure or possession, but acquires constructive possession of the entire tract, if it is not in the adverse possession of any other person at the time of his entry; and such person, in an action of ejectment, will prevail against one who enters subsequently upon the unclosed part, as a mere intruder. But there must be some show of good faith, which does not appear in taking a deed from a stranger having no title, and asserting no claim.¹³ Where a party enters upon land with no higher evidence of title than that which the law presumes from his possession, and distinctly marks out the extent and boundaries of his claim, his actual possession of a part within these boundaries gives him constructive possession of the whole.¹⁴

§ 6274. **Deed as evidence of title.**—Parties and privies are bound by the recitals of a deed through which they claim title.¹⁵

⁷ *Pacquette v. Pickness*, 19 Wis. 219.

⁸ *Payne v. Treadwell*, 16 Cal. 220.

⁹ *Miller v. Myers*, 46 Cal. 535.

¹⁰ *McKinlay v. Tuttle*, 42 Cal. 570.

¹¹ *Arnold v. Woodward*, 14 Colo. 164, 23 Pac. 444.

¹² *Benton v. Hopkins*, 31 Colo. 518,

74 Pac. 891.

¹³ *Walsh v. Hill*, 38 Cal. 481.

¹⁴ *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599.

¹⁵ *Holmes v. Ferguson*, 1 Or. 220;

After the admission of a deed in evidence in ejectment, it is necessary for the party claiming under it to show that it includes the premises in controversy.¹⁶ In California, a deed made prior to the passage of the act concerning conveyances must be first recorded, in order to have priority over a subsequent deed from the same vendor to a *bona fide* purchaser for value without notice.¹⁷ An absolute deed from defendant in ejectment to the plaintiff gives the plaintiff a right of recovery, notwithstanding it be shown to be a mortgage, unless the defendant also show an offer to redeem or tender of the amount due.¹⁸ Under the plea of the general issue in ejectment, a deed absolute in form cannot be attacked on the ground that it was intended to be a mortgage.¹⁹

§ 6275. **Demise.**—Though the demise is a fiction, the plaintiff must count on one which, if real, would support his action.²⁰ Where the right of entry is by virtue of title of the wife, the demise may be laid in the name of the husband, or in the names of both husband and wife.²¹

§ 6276. **Description of premises.**—If the description of the demanded premises does not appear upon the face of the complaint to be insufficient, it is a question of fact for the court or jury whether the description in the same will apply to the land sought to be recovered.²² In California, in an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.²³ Section 58 of the Practice Act, which section 455 of the code supersedes, required the land to be described by metes and bounds, and it was held that this section of the act is directory only; if the complaint describes the premises sufficiently otherwise to identify them according to the general rules on this sub-

Granam v. Meeks, 1 Or. 325. See Robinson v. Thornton, 102 Cal. 675, 34 Pac. 120.

¹⁶ Walbridge v. Ellsworth, 44 Cal. 353.

¹⁷ Anderson v. Fisk, 36 Cal. 625; citing Call v. Hastings, 3 Cal. 179; Stafford v. Lick, 7 Cal. 479; Clark v. Troy, 20 Cal. 223.

¹⁸ Hughes v. Davis, 40 Cal. 117.

¹⁹ Davenport v. Turpin, 43 Cal. 597.

²⁰ Lessee of Binney v. Chesapeake etc. Canal Co., 8 Pet. 214, 8 L. Ed. 921.

²¹ Woodward v. Brown, 13 Pet. 1, 10 L. Ed. 31

²² Moss v. Shear, 30 Cal. 468. See, also, Spect v. Gregg, 51 Cal. 198.

²³ Cal. Code Civ. Proc., § 455. That it is so in Utah, see Darger v. Le Sieur, 9 Utah, 192, 33 Pac. 701.

ject, the plaintiff may, after verdict, take judgment, and the court cannot set it aside on motion of defendant on account of this defect of pleading.²⁴

§ 6277. **Description—Quantity.**—As respects premises claimed, less certainty of description is required now than formerly. Thus the lessor of a plaintiff on a lease for a specific number of acres, may recover any quantity of a less amount.²⁵ But he cannot recover more than is described in the complaint.²⁶ Where the premises were described as “about fifty acres,” etc., it was held that the description was sufficient.²⁷

§ 6278. **Description by designation.**—Where a complaint in ejectment describes the land thus: “All that certain tract or parcel of land situate in Napa county, consisting of a pre-emption claim of one hundred and sixty acres of land commonly known as the Soda Springs, and embracing said springs and the improvements thereto belonging, and being about five miles from Napa city in a northerly direction,” it is sufficient.²⁸

§ 6279. **Description by lines.**—Monumental lines or points control such as are described by course and distance only. The intention of the parties should be ascertained by a consideration of the entire description.²⁹ A description of real property in a complaint in ejectment, giving one of the lines bounding the premises as running due west to the source of a designated creek, is not so insufficient and indefinite as to sustain a demurrer on the ground of its alleged insufficiency. If there be in fact more than one source of the creek, that fact cannot be taken advantage of by the demurrer. It can only be matter for proof on the trial.³⁰ Where the complaint gave a description which embraced nothing whatever, it was held that the complaint was bad.³¹

Where a competent surveyor would have no difficulty in locating the land sued for from the description in the complaint, such

24 *Whitney v. Buckman*, 19 Cal. 300; *Beard v. Federy*, 3 Wall. 478, 18 L. Ed. 88.

25 *Barclay v. Howell*, 6 Pet. 498, 8 L. Ed. 477.

26 *Patton v. Cooper*, 1 Cooke (Tenn.), 133, Fed. Cas. No. 10834.

27 *St. John v. Northrup*, 23 Barb. 25.

28 *Whitney v. Buckman*, 19 Cal. 300.

29 *Piercy v. Crandall*, 34 Cal. 334.

30 *Carpentier v. Grant*, 21 Cal. 140.

31 *Budd v. Bingham*, 18 Barb. 494.

description is sufficient.³² The particular description of the land by courses and distances must control the general description in the same complaint when the two are in conflict.³³ In case of conflict between the natural boundary, or shore-line, and the line as given by courses and distances in the description of the land, the former must control.³⁴ A description of the premises contained in a copy of a deed, which is filed with the complaint as an exhibit, but which deed is not the foundation of the action, cannot be looked to in aid of the allegations of the complaint.³⁵

§ 6280. Description by indication.—By indication, a description is sufficient which indicates and identifies the premises.³⁶ A complaint in ejectment, describing the premises as "Lot No. 1, in block No. 23, as per plot of the town of Red Bluff Land Corporation, in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated by the terms "in said county," referring to the designation "county of Tehama" in the title of the suit, sufficiently describes the premises. The description by metes and bounds required is only so far as they may be necessary to identify with certainty the property.³⁷ The land being described from local objects, such as corners of buildings in the block and from land owned by others, the proof adduced must connect such land so described with the record title of the same.³⁸

§ 6281. Description by name.—Where the land is described in the complaint by a certain name, it is sufficient if it can be rendered certain by evidence.³⁹ Where the complaint in ejectment avers that the land sued for is known by the name of "La Joto," heretofore granted to the plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings

³² *Ayers v. Reidel*, 84 Wis. 276, 54 N. W. 588; *Buesing v. Forbes*, 33 Fla. 495, 15 South. 209; *Hihn v. Mangenberg*, 89 Cal. 268, 26 Pac. 968.

³³ *Haggin v. Lorenz*, 15 Mont. 309, 39 Pac. 285.

³⁴ *Northern Railway Co. v. Jordan*, 87 Cal. 23, 25 Pac. 273.

³⁵ *Liggett v. Lozier*, 133 Ind. 451, 32 N. E. 712. As to insufficient de-
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scription by lines, see *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500.

³⁶ *Paul v. Silver*, 16 Cal. 73; *Grady v. Early*, 18 Cal. 108.

³⁷ *Doll v. Feller*, 16 Cal. 432.

³⁸ *Stoffelo v. Molina*, 8 Ariz. 211, 71 Pac. 912.

³⁹ *Castro v. Gill*, 5 Cal. 40; *Stanley v. Green*, 12 Cal. 148; *Orton v. Noonan*, 18 Wis. 447; *Hildreth v. White*, 66 Cal. 549, 6 Pac. 454.

before the land commission, and the United States court for confirmation, these recitals in the patent support the averment of title through the grant.⁴⁰

§ 6282. **Entry and right of possession.**—To entitle plaintiff to recover, he must not only have a right of entry at the time of the trial, but must have it also when the suit was brought.⁴¹ And that right of entry cannot be impaired by any fraud, misrepresentation, or collusion practiced by him to obtain possession.⁴² But an entry upon a lot in possession of another is not complete until he has expelled the other party, and has effected an exclusive lodgment.⁴³ An entry, with full notice of plaintiff's rights, during the temporary removal of his inclosure, cannot be defended on the ground that the lands were uninclosed.⁴⁴ A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person.⁴⁵

§ 6283. **Parties plaintiff.**—At common law the grantee of the reversion could not enter or bring ejectment for breach of the covenants of a lease.⁴⁶ Where a landlord, after the execution of a lease, failed to put the tenant in possession of the entire property, and the tenant accepts possession and enters upon a part, this will be deemed an abandonment of the lease as to the residue, and the landlord may maintain ejectment therefor against a third person, notwithstanding the lease.⁴⁷ In Ohio, a wife, under a decree giving her the use of a house and lot for alimony, may recover the possession in an action of ejectment;⁴⁸ it is so in the case of a naked trustee, in ejectment against the *cestui que trust*,⁴⁹ but not where he holds the legal title simply on an express trust, without the right of possession.⁵⁰ A petitioner in insolvency may maintain ejectment to recover the homestead.⁵¹ In ejectment one

40 Yount v. Howell, 14 Cal. 465.
See Budd v. Bingham, 18 Barb. 494.
As to variance between the allegations and the proof respecting the premises, see Kellogg v. Kellogg, 6 Barb. 116.

41 Kile v. Tubbs, 32 Cal. 332;
Meeks v. Kirby, 47 Cal. 169.

42 Depuy v. Williams, 26 Cal. 309.

43 Valencia v. Couch, 32 Cal. 339,
91 Am. Dec. 589.

44 Sweetland v. Hill, 9 Cal. 556.

45 Gregory v. Haynes, 13 Cal. 591.

46 Sheets v. Selden's Lessee, 2 Wall.
177, 17 L. Ed. 822.

47 Camarillo v. Fenlon, 49 Cal. 202.

48 Lefevre's Lessee v. Murdock,
Wright, 205.

49 Reece v. Allen, 5 Gilm. 236, 48
Am. Dec. 336; Wales v. Bogue, 31 Ill.

468; Phillpotts v. Blasdel, 8 Nev. 61.

50 Tyler v. Granger, 48 Cal. 259.

51 Moore v. Morrow, 28 Cal. 551

tenant in common may recover possession of the entire tract as against all persons but his cotenants.⁵² Lessees in the actual possession of land from which they are ousted by an intruder may maintain ejectment.⁵³ A landlord may maintain the action to recover possession after the expiration of the term.⁵⁴ So a vendor, or his grantee, may maintain ejectment against a purchaser in possession under a contract of sale who refuses to comply with the terms and conditions of the contract.⁵⁵ An administrator may maintain ejectment to recover real estate of his intestate, to the possession of which the law gives him the right, without alleging in his complaint any possession or right of possession in the intestate.⁵⁶ And when a complaint in ejectment by an administrator contains no allegations as to his representative capacity, the use of words in the title of the cause showing his official capacity without the word "as" will be regarded as mere *descriptio personæ*, and will create no uncertainty or ambiguity. The allegations of the complaint show whether the action is brought by or against a person *en autre droit*.⁵⁷ The heirs or devisees of a deceased owner may sue in ejectment without joining the executor or administrator as a party in the action;⁵⁸ but this does not apply to an heir who has no present right of possession, as a remainderman.⁵⁹

A county may maintain ejectment to recover possession of rooms in the courthouse, and a complaint in such action which alleges facts showing the plaintiff's right of possession of the courthouse, and of the rooms therein described, and that the defendants wrongfully withhold the possession of said rooms from the plaintiff, states a cause of action.⁶⁰ The trustees named in a trust-deed of real property are, under the provisions of section 4872 of the Compiled Laws of South Dakota, the proper parties plaintiff in an action to recover the possession of the property conveyed by such trust-deed, alleged to be unlawfully withheld by defendant.⁶¹

⁵² Weese v. Barker, 7 Colo. 178, 2 Pac. 919.

⁵³ Kirsch v. Brigard, 63 Cal. 319.

⁵⁴ McKissick v. Ashby, 98 Cal. 422, 33 Pac. 729.

⁵⁵ Hicks v. Lovell, 64 Cal. 14, 49 Am. Rep. 679, 27 Pac. 942; Kerns v. Dean, 77 Cal. 555, 19 Pac. 817; Hildreth v. James, 109 Cal. 299, 41 Pac. 1038.

⁵⁶ Oury v. Duffield, 1 Ariz. 509, 25 Pac. 533.

⁵⁷ Burling v. Thompson, 77 Cal. 257, 19 Pac. 429.

⁵⁸ Cal. Code Civ. Proc., § 1452.

⁵⁹ Pryor v. Winter, 147 Cal. 554, 109 Am. St. Rep. 162, 82 Pac. 202.

⁶⁰ County of San Joaquin v. Budd, 96 Cal. 47, 30 Pac. 967.

⁶¹ Lewis v. St. Paul etc. Ry. Co., 5 S. Dak. 148, 58 N. W. 580.

And a complaint alleging that the plaintiffs own the property, describing it, and have owned it since a specified date; that they own and hold it by virtue of a trust-deed made by the former owner to the plaintiffs in trust for certain beneficiaries named; that the defendant, without right or title, entered into possession of a described portion of it, ousted and ejected the plaintiffs therefrom, and does now unlawfully withhold the same, to the plaintiffs' damage, etc., states a good cause of action.⁶²

§ 6284. **Parties defendant.**—An action of ejectment to recover land in the possession of an employee should be brought against an employer, where the occupation of the employee is simply the occupation of his employer.⁶³ But where the employer is not amenable to an action, as in the case of possession by an officer of the United States, the rule does not apply, and such employee is the proper defendant.⁶⁴ In ejectment, one or several defendants may be sued.⁶⁵ Where a defendant in ejectment is sued by a fictitious name, notwithstanding he appears and answers in his true name, the complaint must still be amended by inserting his true name, with apt words charging him with an ouster, to sustain a judgment against him on a direct appeal.⁶⁶ The action is properly brought against one in possession who claims the land under legal title.⁶⁷ That all the defendants are in possession, and that one holds by virtue of a tenancy from the others, makes a cause against all.⁶⁸

§ 6285. **Pennsylvania.**—The common-law remedy by ejectment, as a means of compelling specific performance, is not taken away in Pennsylvania by the grant of equity powers to the courts of

⁶² *Lewis v. St. Paul etc. Ry. Co.*, 5 S. Dak. 148, 58 N. W. 580. As to complaint in ejectment to recover property for use of members of a religious society, see *Baker v. Ducker*, 79 Cal. 365, 21 Pac. 764. As to complaint in ejectment by devisee of decedent, see *Hutchinson v. McNally*, 85 Cal. 619, 24 Pac. 1071.

⁶³ *Hawkins v. Reichert*, 28 Cal. 534. See *Shaw v. Hill*, 83 Mich. 322, 21 Am. St. Rep. 607, 47 N. W. 247.

⁶⁴ *Polack v. Mansfield*, 44 Cal. 36, 13 Am. Rep. 151.

⁶⁵ *Ellis v. Jeans*, 7 Cal. 409.

⁶⁶ *McKinlay v. Tuttle*, 42 Cal. 570. See, also, *Lawrence v. Ballou*, 50 Cal. 258. That ejectment will not lie against a mortgagee at suit of the mortgagor until the mortgage debt is paid, see *Spect v. Spect*, 88 Cal. 437, 22 Am. St. Rep. 314, 26 Pac. 203, 13 L. R. A. 137; *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375; *Hildreth v. James*, 109 Cal. 299, 41 Pac. 1038.

⁶⁷ *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

⁶⁸ *Murray v. Briggs*, 29 Wash. 245, 69 Pac. 765.

common pleas.⁶⁹ The grant of land by the government passes at once to the grantee the legal possession as well as the title, which continues until he is disturbed by an actual adverse possession.⁷⁰

§ 6286. **The complaint.**—A complaint in ejectment alleging that at the time of the commencement of the suit the plaintiff was the owner of and in possession of the entire tract of land sued for, and that for about one year prior thereto the defendant “had been, and now is,” unlawfully in possession, without any right or title, of a described portion thereof, is demurrable for ambiguity.⁷¹ It is not error to permit a petition in a suit to quiet title to be amended before answer, so as to change the action to one in ejectment, where no prejudice is shown.⁷² After defendant in ejectment has answered on the merits, he cannot raise the question of the sufficiency of the complaint as to the designation of the land whereon the unlawful entry was alleged to have been made.⁷³ A defense which merely picks flaws in plaintiff’s title is not new matter which requires a reply.⁷⁴

A complaint alleging ownership and right of possession in plaintiff, that defendant was a tenant at will, that his tenancy had been ended, and, after due notice, defendant had refused to surrender possession, but remains in the occupation of the premises, followed by a prayer for restitution of the premises, for treble damages, and for costs, states a cause of action in ejectment.⁷⁵ The court will take judicial notice of what months of the year are seeding and harvesting seasons.⁷⁶

§ 6287. **Essential averments.**—In an action of ejectment, the material facts which are essential to be alleged by the plaintiff

⁶⁹ *Corson v. Mulvany*, 49 Pa. St. 88, 88 Am. Dec. 485.

⁷⁰ *Green v. Liter*, 8 Cranch, 229, 3 L. Ed. 545; *Potts v. Gilbert*, 3 Wash. C. Ct. 475, Fed. Cas. No. 11347. As to the effect of paying taxes or of omitting to pay taxes, and buying in at a tax-sale, see *Girard v. City of Philadelphia*, 2 Wall. Jr. 301, Fed. Cas. No. 5459; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624, 1 McLean, 266, Fed. Cas. No. 4591; *Wilkes v. Elliot*, 5 Cranch C. C. 611, Fed. Cas. No. 17660.

⁷¹ *Meacham v. Bear Valley Irr. Co.*, 145 Cal. 606, 79 Pac. 281, 68 L. R. A. 600.

⁷² *Curtis v. Schmehr*, 69 Kan. 124, 76 Pac. 434.

⁷³ *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57.

⁷⁴ *Cuenin v. Halbouer*, 32 Colo. 51, 74 Pac. 885.

⁷⁵ *Hayden v. Collins*, 1 Cal. App. 259, 81 Pac. 1120; *McFarland v. Matthai*, 7 Cal. App. 599, 95 Pac. 179.

⁷⁶ *McGillivray v. Miller*, 3 Cal. App. 188, 84 Pac. 778.

are—1. The title of the plaintiff; 2. Possession by the defendant. None of the technical allegations peculiar to the old practice are necessary.⁷⁷ Under our system the plaintiff is not limited to any form of complaint. He may aver seisin in fee, or some estate therein, or prior possession and ouster; but whatever is put in issue will be final and conclusive.⁷⁸ Where the allegations of a complaint in the district court were that the plaintiff was in possession, and lawfully entitled to the possession, at the time he was evicted by the defendant, it was held that the complaint must be treated as a declaration in ejectment.⁷⁹ A complaint in ejectment should aver seisin or right of possession at the time of the commencement of the suit, and it is not sufficient to aver it merely as of the date of the alleged ouster.⁸⁰ Where the complaint alleges that the plaintiff “is the owner and entitled to the possession of the land,” “that defendant is in possession of said lot of land without any right or title thereto, and against the will and without the consent of the plaintiff,” and that said defendant wrongfully withholds the possession of said lot of land from the plaintiff, it is sufficient. That the plaintiff is the owner is in substance an allegation of seisin in fee, in “ordinary” instead of technical language.⁸¹ Where the complaint avers—1. That the plaintiffs are the owners in fee, as tenants in common, of the premises; and 2. That the defendants are in possession of the same, and withhold the possession thereof from the plaintiffs,—it is sufficient. All beyond these averments is immaterial.⁸² Matters of evidence, such as averments of deraignments of title, and unnecessary matters of description of demanded premises, should be stricken out of a com-

⁷⁷ *Payne v. Treadwell*, 16 Cal. 220. See, also, *First Nat. Bank v. Roberts*, 9 Mont. 323, 23 Pac. 718; *Lewis v. St. Paul etc. Ry. Co.*, 5 S. Dak. 148, 58 N. W. 580.

⁷⁸ *Stark v. Barrett*, 15 Cal. 361; *Caperton v. Schmidt*, 26 Cal. 479, 85 Am. Dec. 187; *Payne v. Treadwell*, 16 Cal. 220.

⁷⁹ *Ramirez v. Murray*, 4 Cal. 293.

⁸⁰ *Vance v. Anderson*, 113 Cal. 532, 45 Pac. 816; *disapproving Kidder v. Stevens*, 60 Cal. 420; *Salmon v. Symonds*, 24 Cal. 260; *Yount v. Howell*, 14 Cal. 465. See *Pittsburg etc. Ry. Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528.

⁸¹ *Payne v. Treadwell*, 16 Cal. 242, 244; followed in *Garwood v. Hastings*, 38 Cal. 216. See, also, *Rhoades v. Higbee*, 21 Colo. 88, 39 Pac. 1099.

⁸² *Payne v. Treadwell*, 16 Cal. 247; *Haight v. Green*, 19 Cal. 113; *Ensign v. Sherman*, 14 How. Pr. 439; *Walter v. Lockwood*, 23 Barb. 228; *Sanders v. Leavy*, 16 How. Pr. 308. To same effect, see *Hihn Co. v. Fleckner*, 106 Cal. 95, 39 Pac. 214; *Johnson v. Vance*, 86 Cal. 128, 24 Pac. 863; *Halsey v. Gerdes*, 17 Abb. N. C. 395; *Hihn v. Mangenberg*, 89 Cal. 268, 26 Pac. 968; *Jones v. Memmott*, 7 Utah, 340, 26 Pac. 925; *Northern Pac. R. R. Co. v. Lilly*, 6 Mont. 65, 9 Pac. 116.

plaint in ejectment.⁸³ The complaint need not state the residence of the parties.⁸⁴ Allegations that defendant's possession is "unlawful," and plaintiff's title is "lawful," are wholly unnecessary.⁸⁵ Nor is it necessary to set out the mesne conveyances through which the plaintiff derails title,⁸⁶ since these are but averments of evidence, and are not admitted by a failure to deny them in the answer.⁸⁷ The rule that the burden of proof is on the one claiming good faith in a transaction between husband and wife does not require one claiming title based in part upon such transaction to allege good faith with respect to them.⁸⁸ A complaint in ejectment should not state matters of evidence, but only the ultimate facts constituting the cause of action.⁸⁹ To set out the facts connected with the title and the wrongful acts of the defendant would produce confusion without benefit.⁹⁰ The averment that the defendant "unjustly withholds" the premises is not equivalent to the allegation that he "unlawfully withholds" them, as required by the statute of New Mexico.⁹¹

§ 6288. **Receiver.**—A receiver will not be appointed to take charge of real estate and manage it in a suit in ejectment, as against the party in possession asserting title, unless it be shown to be in imminent danger of great waste or irreparable injury.⁹² It is no ground that the property is deteriorating in value, and that plaintiff is losing the rental from the property, where it appears that the property is in the same condition it has been in for years, save age, and it is not charged that defendant is insolvent or unable to respond in damages for the value of the rent.⁹³ The facts to sustain the claim of irreparable damage must be set out, or it must appear that defendant is unable to respond in damages.⁹⁴

⁸³ *Larco v. Casaneuava*, 30 Cal. 560; *Depuy v. Williams*, 26 Cal. 313; *Willson v. Cleaveland*, 30 Cal. 192.

⁸⁴ *Doll v. Feller*, 16 Cal. 433.

⁸⁵ *Payne v. Treadwell*, 16 Cal. 220; *Sanders v. Leavy*, 16 How. Pr. 308. See *Hildreth v. White*, 66 Cal. 549, 6 Pac. 454.

⁸⁶ *Norris v. Russell*, 5 Cal. 249; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323; *Godwin v. Stebbins*, 2 Cal. 103. See *Hagley v. West*, 3 L. J. Ch. 63.

⁸⁷ *Siter v. Jewett*, 33 Cal. 92. See, also, *Doyle v. Franklin*, 48 Cal. 537.

⁸⁸ *Malloy v. Benway*, 34 Wash. 315, 75 Pac. 869.

⁸⁹ *Depuy v. Williams*, 26 Cal. 309.

⁹⁰ *Garrison v. Sampson*, 15 Cal. 93.

⁹¹ *Osborne v. United States*, 3 N. Mex. 213 (337), 5 Pac. 465.

⁹² *Kelly v. Steele*, 9 Idaho, 141, 72 Pac. 887.

⁹³ *Id.*

⁹⁴ *Union Boom Co. v. Samish River Boom Co.*, 33 Wash. 144, 74 Pac. 53.

§ 6289. **Form of action.**—The plaintiff is not limited to any particular form of complaint, but the form may be adapted to the facts desired to be put in issue. Plaintiff may allege that he is seised of the premises, or of some estate therein, in fee, for life, or for years, or he may aver a former possession and ouster; but whatever is put in issue and determined is conclusive and final.⁹⁵ An allegation in a complaint for the recovery of real property that the ancestor of the plaintiffs died seised and possessed of the property is a sufficient allegation of the possession of the plaintiffs, as when seisin is once shown it will be presumed to continue until allegation and proof of adverse possession in some one else.⁹⁶ A complaint in ejectment states a sufficient cause of action when it alleges that the plaintiff is the owner of the land described therein, subject to the right of redemption of the defendant, setting forth that the plaintiff became such owner by virtue of a sale under execution, describing the court, and alleging that the execution was for the purpose of satisfying a valid judgment entered in the cause, properly describing and setting forth a copy of the sheriff's certificate of sale, together with an allegation that the sale has been confirmed.⁹⁷ In New York, the complaint in an action under the code to recover the possession of real property need not be drawn in the form employed in declarations of ejectment suits, under the Revised Statutes.⁹⁸ Both the complaint and answer in such actions should conform to the rules of pleading laid down in the code, and their sufficiency is to be tested by those rules.⁹⁹

§ 6290. **Entry, insufficient.**—A mere entry, without color of title, accompanied by a survey and marking of boundaries, is not sufficient.¹⁰⁰ So occupation and cultivation can have no greater effect than a private survey.¹⁰¹ And a mere survey and marking the lines of a boundary, without an inclosure of the premises, is not a possession in law, unless made so by compliance with the statutes in reference to possessory actions on public lands.¹⁰² So

⁹⁵ Caperton v. Schmidt, 26 Cal. 490, 85 Am. Dec. 187. See, also, Steinback v. Fitzpatrick, 12 Cal. 295.

⁹⁶ Balch v. Smith, 4 Wash. 497, 30 Pac. 648.

⁹⁷ Belles v. Miller, 10 Wash. 259, 38 Pac. 1050.

⁹⁸ Walter v. Lockwood, 4 Abb. Pr. 307.

⁹⁹ Id. That cases of Warner v. Nelligar, 12 How. Pr. 402, and Lawrence v. Dwight, 3 Duer, 673, are disapproved, see Halsey v. Gerdes, 17 Abb. N. C. 395.

¹⁰⁰ Murphy v. Wallingford, 6 Cal. 648.

¹⁰¹ Waterman v. Smith, 13 Cal. 373.

¹⁰² Bird v. Dennison, 7 Cal. 297.

the mere inclosure of the lot with a brush fence from two to three feet high, without any other steps taken to subject the property to any use, is not sufficient evidence of ownership or right of possession.¹⁰³ No entry upon real estate is deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after making such entry, and within five years from the time when the right to make it descended and accrued.¹⁰⁴

§ 6291. Highways—Streets.—Ejectment lies by the owner in fee against one who has exclusively appropriated a part of a public street or highway to his own private use.¹⁰⁵ Cities entitled to sue and be sued, and to establish streets, etc., may maintain ejectment to recover a portion of one of its public streets.¹⁰⁶ And in case of a toll-road, where plaintiff owns the fee, and is excluded by the defendant except on payment of toll, and then only admitted for the purpose of passing over the land, ejectment lies.¹⁰⁷ And where the owner in his conveyance excepts the portions included in a highway, he may maintain ejectment against his grantee for encroachments thereon or exclusive occupation.¹⁰⁸ But the possession must be exclusive of the public.¹⁰⁹ Possession of land adjoining a road for seventy years is sufficient to enable plaintiff to maintain ejectment as to the roadway where the possession has been under a deed which describes the boundary as made by the road simply, without mentioning it as made by any particular line of road.¹¹⁰

Ejectment is not the proper remedy where the use of a street by a street railway is interfered with by another road.¹¹¹

§ 6292. Identifying land in controversy.—Where plaintiff claims title under a deed from the commissioners of the funded

¹⁰³ *Hutton v. Schumaker*, 21 Cal. 453.

¹⁰⁴ Cal. Code Civ. Proc., § 320.

¹⁰⁵ *Goodtitle v. Aiken*, 1 Burr. 133; *Jackson v. Hathaway*, 15 Johns. 447, 8 Am. Dec. 263; *Brown v. Galley*, Hill & D. Supp. 308.

¹⁰⁶ *City of Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982.

¹⁰⁷ *Mahon v. San Rafael T. R. Co.*, 49 Cal. 269.

¹⁰⁸ *Smith's Lead. Cas.* 183; *Etz v. Daily*, 20 Barb. 32.

¹⁰⁹ *Redfield v. Utica etc. R. R. Co.*, 25 Barb. 54.

¹¹⁰ *Dunham v. Williams*, 36 Barb. 136. That ejectment is a proper remedy for the appropriation of a highway, see *Carpenter v. Oswego etc. R. R. Co.*, 24 N. Y. 655; *Lozier v. New York Cent. R. R. Co.*, 42 Barb. 465; *Wager v. Troy Union R. R. Co.*, 25 N. Y. 526.

¹¹¹ *Fresno Street Ry. Co. v. Southern Pacific Ry. Co.*, 135 Cal. 202, 67 Pac. 773.

debt of the city of San Jose, it is incumbent on the plaintiff to show that the premises had not been granted or conveyed by the pueblo or the city prior to the execution of the deed of the commissioners to the plaintiff's grantor.¹¹² So where the conveyance was of "the balance" of a tract of fourteen hundred acres, the court held that it was necessary to show what "the balance" was, and that it included the land in controversy.¹¹³ A party claiming title under a deed cannot show title to the premises in controversy by the mere production and proof of the deed; he must show that the description of the land in the deed includes the land in controversy.¹¹⁴ Where there is a mistake in the first call of a deed, and the remaining calls are sufficient to identify the land, the court may hold that the land in controversy is covered by the deed.¹¹⁵

§ 6293. **Injunction.**—In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of the equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought.¹¹⁶ And in such case, if the complaint states a good cause of action in ejectment, it will not be dismissed, even though the part upon which the injunction is asked should not justify such relief.¹¹⁷

§ 6294. **Intervention.**—In ejectment, the matter in litigation is the right to the possession on the part of the plaintiff, and his ouster by the defendant. And a party who merely sets up title in himself, but in no way connects himself either with this right of possession or ouster, has no right to intervene.¹¹⁸

§ 6295. **Joinder of actions.**—A claim to recover possession of a farmhouse and yard, occupied by plaintiff's permission, and damages for trespass on the farm, cannot be joined in one com-

¹¹² *Halloway v. Galliac*, Cal. Sup. Ct., Oct. Term, 1869.

¹¹³ *Taylor v. Taylor*, 3 A. K. Marsh. (Ky.) 19; *Mayor and Common Council of San Jose v. Uridias*, 37 Cal. 339; cited in *Halloway v. Galliac*, Cal. Sup. Ct., Oct. Term, 1869.

¹¹⁴ *Halloway v. Galliac*, Cal. Sup.

Ct., Oct. Term, 1869. See, also, *McGarvey v. Little*, 15 Cal. 27.

¹¹⁵ *Moss v. Shear*, 30 Cal. 479; *Reamer v. Nesmith*, 34 Cal. 624; cited in *Walsh v. Hill*, 38 Cal. 481.

¹¹⁶ *Natoma W. & M. Co. v. Clark-in*, 14 Cal. 544.

¹¹⁷ *McNeady v. Hyde*, 47 Cal. 481.

¹¹⁸ *Porter v. Garrissino*, 51 Cal. 559.

plaint.¹¹⁹ For a claim for injuries to the freehold cannot be joined with demand for reserve profits.¹²⁰ In Illinois, a party who holds a bond and mortgage to secure a debt may maintain an action of ejectment to recover the mortgaged premises, foreclose the equity of redemption in chancery, and sue on the bond, and have all these actions proceed at the same time.¹²¹

§ 6296. Joint liability.—If one of two defendants, with the knowledge and consent of the other, employs men to remove buildings and fences from land, turn out the occupants, and take possession, the acts performed and possession so acquired are as much the acts and possession of the one who assented to them in advance, and for whose benefit, in part, such possession was taken and held, as of the party who actually employed the men and directed the acts to be done.¹²²

§ 6297. Land subject to easement.—Notwithstanding the land is subject to a public easement,—e. g. where it has been appropriated as a street, the owner of a fee may maintain an action in the nature of ejectment against one occupying it unlawfully,—e. g. by laying a railroad track on it.¹²³ But an action of ejectment does not lie against a municipal corporation for using and grading plaintiff's land as a street. Such acts are evidence only of a claim to a mere easement.¹²⁴ A municipal corporation may maintain ejectment for land of which it owns the legal title, notwithstanding it is held in trust for public use as a street.¹²⁵ The action of ejectment does not lie for an easement which is no title to or interest in land.¹²⁶

§ 6298. Measure of relief.—A complaint may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and

¹¹⁹ *Hulce v. Thompson*, 9 How. Pr. 113.

¹²⁰ *Frost v. Duncan*, 19 Barb. 560.

¹²¹ *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354.

¹²² *Treat v. Reilly*, 35 Cal. 129.

¹²³ *Carpenter v. Oswego etc. R. R. Co.*, 24 N. Y. 655. But see *Wilklow v. Lane*, 37 Barb. 244. See, also, *Mahon v. San Rafael T. R. Co.*, 49 Cal.

269; *McCarty v. Clark County*, 101 Mo. 179, 14 S. W. 51; *Armstrong v. St. Louis*, 69 Mo. 309, 33 Am. Rep. 499.

¹²⁴ *Cowenhoven v. City of Brooklyn*, 38 Barb. 9.

¹²⁵ *San Francisco v. Sullivan*, 50 Cal. 603.

¹²⁶ 4 Kent Com. 419; *Hewlins v. Shippam*, 5 Barn. & Cress. 221.

not require different places of trial.¹²⁷ Distinct parcels of land may not only be included in one complaint, if covered by one title, but a demand for their rents and profits, or for damages for withholding them, may also be included.¹²⁸ In an action to recover possession of land, brought against a party who was a naked trespasser upon his entry, and who, while such trespasser, made improvements, but afterwards became a cotenant, the plaintiff can recover the increased value of the rents and profits arising from such improvements.¹²⁹

§ 6299. **Mexican grants.**—One who, without the permission of the grantee, takes possession of the land within the boundaries of a Mexican grant, whether perfect or inchoate, before the final survey is made by the United States, is guilty of an ouster, although informed by the grantee that the land so taken is not within the limits of the grant.¹³⁰ For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, California, ejectment will lie directly upon the grant, although no official survey and measurement have yet been made by the officers of the government, and although it may appear, when such survey and measurement are made, that there exists within the exterior limits of the general tract a quantity exceeding the eleven leagues.¹³¹ If, after the death of the grantee of an unconfirmed Mexican grant, his heirs petition for and obtain a confirmation of the title and patent to themselves, the legal title vests in them, and will prevail in ejectment against purchasers from the administrator of the Mexican grantee under orders of the probate court, in the absence of a valid equitable defense. Such title does not inure to the purchaser at the administrator's sale so as to vest in him the legal title.¹³² One who relies on a confirmed Mexican grant as a source of title must show that the premises in question are within the decree of confirmation.¹³³

§ 6300. **Mortgaged land.**—The mortgagee will not be permitted to set up an adverse possession to bar the rights of the

¹²⁷ *Boles v. Cohen*, 15 Cal. 150.

¹²⁸ *Beard v. Federy*, 3 Wall. 478, 18 L. Ed. 88.

¹²⁹ *Carpentier v. Mitchell*, 29 Cal. 330.

¹³⁰ *Love v. Shartzer*, 31 Cal. 487.

¹³¹ *Cornwall v. Culver*, 16 Cal. 423;

affirmed in *Riley v. Heisch*, 18 Cal. 198. See, also, *Mahoney v. Van Winkle*, 21 Cal. 552.

¹³² *Hartley v. Brown*, 51 Cal. 465.

¹³³ *Brown v. Brackett*, 45 Cal. 167.

See *Valentine v. Sloss*, 103 Cal. 215, 37 Pac. 326, 410.

mortgagor, unless it has existed long enough to constitute an equitable bar from lapse of time.¹³⁴ Nor is the possession of the mortgagor adverse to the rights of the mortgagee.¹³⁵ But after forfeiture the mortgagee may maintain ejectment.¹³⁶ In California, the practice is to foreclose the mortgage and sell the property, and the mortgagee cannot maintain ejectment until he has a sheriff's deed.¹³⁷ The purchaser at a foreclosure sale is entitled to a writ of assistance on motion, and to be placed in possession thereunder without resorting to ejectment.¹³⁸ A bare mortgage of the premises will not sustain such action, under the rule that a mortgagee cannot bring ejectment for the mortgaged premises.¹³⁹ That no action of ejectment shall be maintained by a mortgagee applies to one who holds by a conveyance absolute upon its face, but really given to secure a debt.¹⁴⁰ The title of a mortgagee in possession after condition broken is not divested by sale on a judgment against the mortgagor, so as to allow a recovery in an action of ejectment by a purchaser at such sale, or by heirs of the mortgagor.¹⁴¹ It is otherwise, however, if the mortgagee never took possession.¹⁴²

§ 6301. **Ouster.**—The averment of wrongful withholding is equivalent to averment of an ouster.¹⁴³ And the ouster must be alleged subsequent to the date of the plaintiff's title.¹⁴⁴ But the complaint need not state the exact time of the alleged ouster, especially where no claim is made for damages, and no recovery had for them,—the allegation in this case as to the time of ouster being "on or about . . . , 19..."¹⁴⁵ The date of the ouster need not be alleged.¹⁴⁶ The date is only material with reference to

¹³⁴ *Gordon v. Hobart*, 2 Sumn. 401, Fed. Cas. No. 5609. Compare *Dexter v. Arnold*, 2 Sumn. 108, Fed. Cas. No. 3858.

¹³⁵ *Higginson v. Mein*, 4 Cranch, 415, 2 L. Ed. 664. See, also, *Conner v. Whitmore*, 52 Me. 185, where it is held that a mortgagor cannot maintain ejectment against a mortgagee in possession. That it is otherwise in Pennsylvania, see *Wells v. Van Dyke*, 109 Pa. St. 330.

¹³⁶ *Ballentine v. Beall*, 3 Scam. 203; *Roland v. Fisher*, 30 Ill. 224; *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863.

¹³⁷ See Cal. Civ. Code, § 2927.

¹³⁸ *Montgomery v. Tutt*, 11 Cal. 190; *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Frisbie v. Fogarty*, 34 Cal. 11.

¹³⁹ See *Sahler v. Signer*, 37 Barb. 329.

¹⁴⁰ *Murray v. Walker*, 31 N. Y. 399.

¹⁴¹ *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896.

¹⁴² *Doe ex dem. Hall v. Tunnell*, 1 Houst. (Del.) 320.

¹⁴³ *Marshall v. Shafter*, 32 Cal. 176.

¹⁴⁴ *Coryell v. Cain*, 16 Cal. 567.

¹⁴⁵ *Collier v. Corbett*, 15 Cal. 183.

¹⁴⁶ *Woodward v. Brown*, 13 Pet. 1,

mesne profits.¹⁴⁷ Under an allegation of an ouster, a holding-over may be shown.¹⁴⁸ In an action against plaintiff's cotenant it is sufficient for the plaintiff to show that the defendant's entry into possession was under a claim hostile to the rights of the plaintiff.¹⁴⁹ Adverse holding and claim of title do not of themselves constitute an ouster as between cotenants, unless the tenant out of possession is informed thereof; but a denial of plaintiff's title in the answer of the defendant is sufficient proof of an ouster.¹⁵⁰ To enable the plaintiff to recover on prior possession, he must allege and prove an actual ouster.¹⁵¹ In an action of ejectment between tenants in common, a complaint which avers that the defendant is in possession of the common property, and the whole thereof, withholds the possession of the whole thereof from the plaintiff, and excludes him from the same, sufficiently alleges an ouster.¹⁵² A complaint in ejectment, otherwise sufficient, is not changed in character by alleging that the entry and ouster were made willfully, fraudulently, maliciously, and forcibly.¹⁵³

§ 6302. **Overflowed lands.**—A grant of land under water, for the purpose of erecting a wharf thereon, is not an easement. The right to build a wharf and take tolls is an easement. But as incident to this right, a grant of the use and occupancy of a strip of overflowed land conveys an estate in the land which authorizes the grantees to take possession, occupy, and control it for the purposes of the grant. It is something of which they could be dispossessed, and, if ousted, ejectment would lie.^{153a} Where a right of entry existed, and the interest is tangible, so that possession could be given, ejectment would lie.¹⁵⁴ So, though it will not lie for a watercourse, yet it will lie for the ground over which the water passes.¹⁵⁵

10 L. Ed. 31. See *Cole v. Segraves*, 88 Cal. 103, 25 Pac. 1109.

147 *Stark v. Barrett*, 15 Cal. 361.

148 *Garrison v. Sampson*, 15 Cal. 93.

149 *Clason v. Rankin*, 1 Duer, 337.

150 *Miller v. Myers*, 46 Cal. 535; *Speet v. Gregg*, 51 Cal. 198. See, also, *Abbey Homestead Assoc. v. Willard*, 48 Cal. 614; *Packard v. Johnston*, 51 Cal. 545.

151 *Watson v. Zimmerman*, 6 Cal. 46. As to allegation of ouster being

necessary for a recovery, see *Lawton v. Gordon*, 37 Cal. 207.

152 *Rego v. Van Pelt*, 65 Cal. 254, 3 Pac. 867, 2 West Coast Rep. 903.

153 *Hildreth v. White*, 66 Cal. 549, 6 Pac. 454.

153a *Champlain etc. R. R. Co. v. Valentine*, 19 Barb. 487.

154 *Frisbie v. McClernin*, 38 Cal. 568.

155 *Yelv.* 143. See *Ezzard v. Findley Gold Min. Co.*, 74 Ga. 520, 58 Am. Rep. 445.

§ 6303. **Owner.**—The allegation that the plaintiff “is the owner” of the land is in substance an allegation of seisin in fee, in “ordinary” instead of technical language.¹⁵⁶ The averment of seisin in fee is equivalent to an averment of the right to immediate possession, and therefore the defendant’s possession and withholding are necessarily wrongful, and an allegation to that effect is not required.¹⁵⁷

§ 6304. **Possession by plaintiff.**—A complaint which shows that the plaintiff is in possession is bad on demurrer.¹⁵⁸

§ 6305. **Possession by defendant.**—The burden of showing five years’ adverse possession is on the defendant. The plaintiff having shown title, the possession is presumed to follow the title.¹⁵⁹ If it be shown that defendant was in possession before and after suit, plaintiff need not show him to be in possession on the day suit is brought.¹⁶⁰ Nor need the possession be actual as contradistinguished from constructive possession.¹⁶¹ In Wisconsin, it would seem that it is not necessary to allege that defendant is in possession at the time of the commencement of the action.¹⁶² The possession by the defendant is an issuable fact, and its possible rightful character need not be negatived.¹⁶³ And a continued adverse holding must be shown.¹⁶⁴ The tenant in possession is the only necessary party defendant in an action of ejectment.¹⁶⁵

§ 6306. **Possession as evidence of title.**—One in the possession of land is presumed to be the owner thereof.¹⁶⁶ So of agricultural

¹⁵⁶ *Garwood v. Hastings*, 38 Cal. 216; citing *Payne v. Treadwell*, 16 Cal. 220, 244.

¹⁵⁷ *Halsey v. Gerdes*, 17 Abb. N. C. 395; disapproving *Moore v. Lehman*, 20 Jones & Sp. 283.

¹⁵⁸ *Graves v. Marine Ins. Co.*, 2 Caires, 339; *Taylor v. Crane*, 15 How. Pr. 358. See, also, *Hulce v. Thompson*, 9 How. Pr. 113; *Budd v. Bingham*, 18 Barb. 494; *Frost v. Duncan*, 19 Barb. 560.

¹⁵⁹ *Garwood v. Hastings*, 38 Cal. 223. But see *Lawrence v. Ballou*, 50 Cal. 258.

¹⁶⁰ *Doe v. Roe*, 30 Ga. 553.

¹⁶¹ *Crane v. Ghirardelli*, 45 Cal. 235.

¹⁶² *Herriek v. Graves*, 16 Wis. 157.

¹⁶³ *Payne v. Treadwell*, 16 Cal. 244.

¹⁶⁴ *Steinback v. Fitzpatrick*, 12 Cal. 295.

¹⁶⁵ *Raymond v. Morrison*, 9 Wash. 156, 37 Pac. 318.

¹⁶⁶ See *Hicks v. Davis*, 4 Cal. 69; *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Murphy v. Wallington*, 6 Cal. 649; *Wolf v. Baldwin*, 19 Cal. 314; *Dyson v. Bradshaw*, 23 Cal. 537; *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; *Bird v. Lisbros*, 9 Cal. 1, 70 Am. Dec. 617; *Norris v. Russell*, 5 Cal. 249; *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 577; *Donahue v. Gallavan*, 43 Cal. 573.

land as against a trespasser.¹⁶⁷ The possession of real property raises the presumption of the title in the possessor.¹⁶⁸ It is evidence of seisin in fee.¹⁶⁹ And the possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff.¹⁷⁰ But it must be an actual, *bona fide* occupation, or *possessio pedis*, and not a mere assertion of title, and the exercise of casual acts of ownership, such as recording deeds, paying taxes, etc.;¹⁷¹ nor by insufficient fencing without actual occupation.¹⁷² But a fact that a person is in the possession of one acre does not raise any presumption that he has title to an unlimited tract in the same neighborhood.¹⁷³ Nor is the possession of one lot to be deemed a possession of other lots of a tract subdivided.¹⁷⁴ It is error to instruct the jury that, the defendant being in possession, it is necessary for plaintiff to show an earlier and better possession in order to recover.¹⁷⁵

§ 6307. **Possession as notice of title.**—Open and notorious possession of land, existing at the time of the acquisition of title or deed of the subsequent vendee, is evidence of notice to him of title, even though the first vendee has an unrecorded deed for it.¹⁷⁶ And this rule applies as well to any other title consistent with the possession.¹⁷⁷ So such possession by a tenant is sufficient to put the purchaser upon inquiry as to the landlord's title.¹⁷⁸ The possession of the grantor is that of the purchaser.¹⁷⁹ A purchaser of the legal title has notice of equity of another in possession.¹⁸⁰

§ 6308. **Property in another.**—When parties assert, either by declaration or conduct, the title of the property to be in others, the statute, of course, cannot run in their favor, and their posses-

167 Burdge v. Smith, 14 Cal. 380.

168 Bernal v. Gleim, 33 Cal. 668.

169 Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738.

170 Rose v. Davis, 11 Cal. 133.

171 Plume v. Seward, 4 Cal. 94, 60 Am. Dec. 599.

172 Borel v. Rollins, 30 Cal. 408.

173 Havens v. Dale, 18 Cal. 359.

174 Cal. Code Civ. Proc., § 322.

175 Sweeney v. Reilly, 42 Cal. 402.

176 Hunter v. Watson, 12 Cal. 363, 73 Am. Dec. 543.

177 Partridge v. McKinney, 10 Cal.

181; Havens v. Dale, 18 Cal. 359; Woodson v. McCune, 17 Cal. 298. See, also, Lestrade v. Barth, 19 Cal. 660; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Fair v. Stevenot, 29 Cal. 486.

178 Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765; Landers v. Bolton, 26 Cal. 393.

179 Ellis v. Jeans, 7 Cal. 409.

180 Bryan v. Ramirez, 8 Cal. 461, 68 Am. Dec. 340. See, also, Morrison v. Wilson, 13 Cal. 494, 73 Am. Dec. 593.

sion is not adverse.¹⁸¹ Nor can a mere intruder defeat a recovery or diminish the damages which might otherwise be recovered against him by showing an outstanding title in a third person.¹⁸²

§ 6309. Public lands.—To constitute adverse possession on public lands, it is sufficient if the party in possession claims against all the world except the United States; it is not necessary that he possesses under color of title.¹⁸³ The same rule applies to the possession of an old river-bed.¹⁸⁴ The pretended possession of land with an insufficient inclosure, but without actual occupancy, will not establish adverse possession.¹⁸⁵ But one claiming to have acquired a title to land by adverse possession of five years, need only show that such possession was held by an inclosure, and need not prove occupation, cultivation, or use of the premises.¹⁸⁶ Natural barriers may be sufficient in place of an inclosure by fences.¹⁸⁷ A settler on public land is entitled to a reasonable time after his location within which to inclose it or make improvements necessary to its enjoyment; and during such time he will be protected the same as if he had perfected possession by inclosure or otherwise.¹⁸⁸ Or if the possession be of state lands, actual occupation and use, to the exclusion of others, will suffice, without barriers sufficient to turn stock.¹⁸⁹

§ 6310. Rents and profits.—Where rents and profits are claimed prior to the commencement of the action, the complaint must state the title of the plaintiff as existing at some prior date, and continuing up to the commencement of the action, and the entry of the defendant at some date subsequent to that of the alleged title.¹⁹⁰ He is entitled to damages measured by the value of the rents and profits up to the time the judgment is rendered.¹⁹¹

181 *McCracken v. City of San Francisco*, 16 Cal. 591.

182 *Southmayd v. Henley*, 45 Cal. 101.

183 *Page v. Fowler*, 28 Cal. 605.

184 *Hanson v. Stinehoff*, 139 Cal. 169, 72 Pac. 913.

185 *Borel v. Rollins*, 30 Cal. 408; *Hughes v. Hazard*, 42 Cal. 149. See *Reay v. Butler*, 95 Cal. 206, 30 Pac. 208.

186 *Polack v. McGrath*, 32 Cal. 15; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed.

624; affirming 1 McLean, 266, Fed. Cas. No. 4591. See *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

187 *Smith v. Hicks*, 139 Cal. 217, 73 Pac. 144.

188 *Staininger v. Andrews*, 4 Nev. 59.

189 *Smith v. Hicks*, 139 Cal. 217, 73 Pac. 144.

190 *Payne v. Treadwell*, 16 Cal. 248.

191 *Love v. Shartzner*, 31 Cal. 487; *Rich v. Maples*, 33 Cal. 102.

But the rents and profits must be shown by the complaint to be connected with and arising out of the wrongful withholding of possession,¹⁹² and are limited to such as accrue subsequent to the ouster alleged,¹⁹³ or subsequent to the accruing of his right of possession.¹⁹⁴ But in an action to recover possession of land on a title acquired by sheriff's sale and a deed thereunder, the plaintiff cannot recover the rents and profits accrued during the period allowed for redemption,¹⁹⁵ as the right depends upon title. An allegation of the value of the use and occupation, rents and profits of the premises for the period during which defendants were in the wrongful possession and excluded plaintiff, is sufficient to charge defendants, without any averment that they received such rents and profits.¹⁹⁶

§ 6311. Rents and profits—Demand for.—In Ohio, the demand for rents and profits is deemed a separate cause of action, and should be separately stated.¹⁹⁷ So in New York;¹⁹⁸ a demand of damages for the ouster does not cover them.¹⁹⁹ In California, when they are claimed in an independent suit, the record of recovery in ejectment is, as to the title, only evidence of the right of possession of the plaintiff at the commencement of the action in which the recovery was had.²⁰⁰ The legislature has no power to enable another person who has no title to recover from the person entitled to the possession the rents and profits of the land.²⁰¹

§ 6312. Rents and profits—Right to.—The right to mesne profits is a necessary consequence of the recovery in ejectment.²⁰² But defendant is only to be held liable for the time he was in possession in fact, or in judgment of law.²⁰³ And the measure of damages in such action is that which would obtain in *assumpsit*

¹⁹² *Tompkins v. White*, 8 How. Pr. 420.

¹⁹³ *Yount v. Howell*, 14 Cal. 465.

¹⁹⁴ *Clark v. Boyreau*, 14 Cal. 634.

¹⁹⁵ *Id.*; *Henry v. Everts*, 30 Cal. 425.

¹⁹⁶ *Patterson v. Ely*, 19 Cal. 28; *Johnson v. Visser*, 96 Cal. 310, 31 Pac. 106.

¹⁹⁷ See *Swan's Pl.* 444; Ohio Code, §§ 80, 81; *McKinney v. McKinney*, 8 Ohio St. 423.

¹⁹⁸ *Holmes v. Davis*, 21 Barb. 265.

¹⁹⁹ *Livingston v. Tanner*, 12 Barb. 481.

²⁰⁰ *Yount v. Howell*, 14 Cal. 465.

²⁰¹ *Rich v. Maples*, 33 Cal. 102.

²⁰² *Benson v. Matsdorf*, 2 Johns. 369; *Jackson v. Randall*, 11 Johns. 405; *Baron v. Abeel*, 3 Johns. 481, 3 Am. Dec. 515.

²⁰³ *Ryers v. Wheeler*, Hill & D. Supp. 389.

for use and occupation.²⁰⁴ Under the practice in California, it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action.²⁰⁵ And if plaintiff is in possession of a portion of the land, damages should not be assessed for the use of the entire tract.²⁰⁶ And damages may be awarded on a default.²⁰⁷ But unless judgment is given for the possession, damages for the withholding, or for rents and profits, cannot be recovered.²⁰⁸

§ 6313. **Right of possession.**—To maintain ejectment, a right of entry and possession is all that is required. A contrary doctrine would defeat the policy in view of which pre-emption rights were conceived, by putting the settlement and improvement of the pre-emptioner at the mercy of any stranger who might choose to trespass upon them.²⁰⁹ A mere naked fee does not always warrant a recovery in ejectment. The plaintiff must prove the right to the possession.²¹⁰ But if no adverse title be shown, recovery may be had without showing the right of possession, or an entry, or a right of entry in his lessor,²¹¹ even if the deed of such grantor purporting to convey was fraudulent.²¹² The right of the possession depends upon title. So when the vendor's title expires, his right to possession also expires. So held in a case where the vendor sued to eject the purchaser, who set up title under the homestead law to government lands, the plaintiff in the action claiming right of possession only. If the defendant was estopped by reason of the contract of sale from setting up title, the plaintiff, by admitting he had no title, will not be admitted to set up the estoppel to show that his admission was untrue, as it would then be an estoppel against an estoppel, "which setteth the matter at large."²¹³

²⁰⁴ *Holmes v. Davis*, 19 N. Y. 488.

²⁰⁵ *Sullivan v. Davis*, 4 Cal. 291.

²⁰⁶ *Ellis v. Jeans*, 26 Cal. 272.

²⁰⁷ *Dimick v. Campbell*, 31 Cal. 238.

²⁰⁸ *Locke v. Peters*, 65 Cal. 161, 3 Pac. 657.

²⁰⁹ *Toland v. Mandell*, 38 Cal. 43.

²¹⁰ *Wood v. Morton*, 11 Ill. 547; *Pitkin v. Yaw*, 13 Ill. 251; *Tilghman*

v. Little, 13 Ill. 239; *Joy v. Berdell*, 25 Ill. 537; *Gillett v. Treganza*, 13 Wis. 474; *Johnson v. Adelman*, 35 Ill. 265; *City of Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452.

²¹¹ *Wilkes v. Elliott*, 5 Cranch C. 611, Fed. Cas. No. 17660.

²¹² *Gregg v. Sayre*, 8 Pet. 244, 8 L. Ed. 932; *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280.

²¹³ *Holden v. Andrews*, 38 Cal. 122.

§ 6314. **Seisin in fee.**—Under an allegation of seisin in fee of the premises, plaintiff may recover if he show any interest entitling him to possession.²¹⁴ And from seisin in fee, and of possession by defendant when established, the law implies a right to the present possession in the plaintiff, and a holding adverse thereto by one defendant.²¹⁵ But the presumption may be rebutted by proof of an equitable title in another of the character to carry the right of possession.²¹⁶ To sustain an action of ejectment, an averment of seisin is essential, and must be alleged to have been within the time limited for bringing the action.²¹⁷ A variance between the alleged seisin and right of possession of plaintiff and the date of the conveyance to him is immaterial.²¹⁸

§ 6315. **Settlers upon public land.**—Persons having settled in person upon public land, improved it, and erected dwelling-houses thereon, are lawfully in possession, have a right to be protected in it, and, if ousted, may sue to recover it. To maintain ejectment, a right of entry and possession is all that is required.²¹⁹ One making the original homestead entry, which, upon contest, is sustained, may eject others claiming by quitclaim deeds from others and from the lessee of the homesteader, who had no right to sublet the premises.²²⁰ When defendant claims under a patent senior to plaintiff's claim, the burden is upon plaintiff to overthrow the presumptions in favor of such patent.²²¹ The patent is conclusive as to the description of the land granted;²²² and if it conveys more than the government receives pay for, none but the government or its grantees can question the title or right to possession of the whole thereof.²²³ A settler on public land, if ousted after the lapse of a reasonable time within which to improve it, can recover against the person in possession only by

²¹⁴ Stark v. Barrett, 15 Cal. 361.

²¹⁵ Payne v. Treadwell, 16 Cal. 220; Salmon v. Symonds, 24 Cal. 260.

²¹⁶ Willis v. Wozencraft, 22 Cal. 607.

²¹⁷ Bockee v. Crosby, 2 Paine, 432, Fed. Cas. No. 1593; Salmon v. Symonds, 24 Cal. 266. See Cal. Code Civ. Proc., §§ 318, 319.

²¹⁸ Stark v. Barrett, 15 Cal. 361.

²¹⁹ Payne v. Treadwell, 16 Cal. 220; Yount v. Howell, 14 Cal. 463;

Grady v. Early, 18 Cal. 108; Hubbard v. Barry, 21 Cal. 321; Bullock v. Wilson, 2 Port. (Ala.) 437; Masters v. Eastis, 3 Port. (Ala.) 368; cited in Toland v. Mandell, 38 Cal. 30.

²²⁰ White v. Johnson, 10 Idaho, 438, 79 Pac. 455.

²²¹ Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140.

²²² Miller v. Grunsky, 141 Cal. 441, 66 Pac. 858, 75 Pac. 48.

²²³ Johnson v. Hurst, 10 Idaho, 308, 77 Pac. 784.

showing an actual, notorious, prior possession.²²⁴ Where he shows that he first entered upon it, marked out the boundaries, and diligently proceeded, or diligently made preparations to do such acts as were necessary to constitute an actual possession, he will be entitled, even without showing an actual possession, to recover against a person subsequently entering.²²⁵

§ 6316. Settler, complaint by.—Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, “the same being public land of the United States,” and that subsequently H., a foreigner, built a house and occupied a portion of the tract, and that H.’s executor offered the same for sale, and that plaintiff prayed for an injunction and damages for the occupation, it was held that the complaint did not state facts sufficient to constitute a cause of action.²²⁶ That at a certain time the party received a deed of a tract of land, and from that time forward continued in the actual, exclusive, adverse, and notorious possession, and had the same protected by a substantial inclosure, is an adverse possession.²²⁷

§ 6317. Statute of limitations.—The statute of limitations distinguishes between an entry made without any right or claim of right and one made under a claim or color of title. The naked disseisor is regarded with the greater disfavor, and his possession is strictly to the land in his actual, exclusive possession, coextensive with his metes and bounds.²²⁸ Peaceable and uninterrupted possession for seven years, under a grant or deed of conveyance, gives a complete title to a person in possession.²²⁹ And a naked trespasser for seven years is not a bar to the action.²³⁰ But a connected title need not be shown.²³¹ The possession of one having no title, but holding by consent of another, may be connected with the title of such other.²³² Under the statute of Ken-

²²⁴ *Staininger v. Andrews*, 4 Nev. 59. For insufficient possession, see *Hughes v. Hazard*, 42 Cal. 149.

²²⁵ *Staininger v. Andrews*, 4 Nev. 59.

²²⁶ *O’Conner v. Corbitt*, 3 Cal. 371.

²²⁷ *Vassault v. Seitz*, 31 Cal. 225.

²²⁸ *Walsh v. Hill*, 38 Cal. 481. See, also, Cal. Code Civ. Proc., §§ 323-325.

²²⁹ *Piles v. Bouldin*, 11 Wheat. 325, 6 L. Ed. 486.

²³⁰ *Patton v. Hynes*, 1 Cooke, 357, Fed. Cas. No. 10835.

²³¹ *Green v. Neal*, 6 Pet. 291, 8 L. Ed. 402; overruling *Patton v. Easton*, 1 Wheat. 476, 4 L. Ed. 139; *Den v. Turner*, 9 Wheat. 541, 6 L. Ed. 155; *Powell v. Harman*, 2 Pet. 241, 7 L. Ed. 411.

²³² *McIver v. Reagan*, 1 Cooke, 366, Fed. Cas. No. 8832.

tucky an adverse possession under a survey previous to patent may be connected with possession under the patent.²³³ So a party entering into possession of land under a patent, but not showing a paper title to any particular portion is deemed as claiming to the abutments of the patent against other parties not then in seisin or possession.²³⁴ Where a party is brought in on motion of the plaintiff as an additional defendant, after the suit has been some time pending, such defendant may avail himself of the statute of limitations up to the time he is made a party.²³⁵ Nor does the pendency of a suit estop the plaintiff in such action from setting up the statute of limitations in a suit subsequently brought against him.²³⁶

§ 6318. **Title by limitation.**—Adverse possession for five years gives a title to the land.²³⁷ In Utah, even though a minor is exempt until within two years after removal of disability of minority,²³⁸ and such period of disability is excluded in computing time from the accrual of the cause of action,²³⁹ nevertheless, since the administrator has the right and is required to take possession of all real estate of the deceased,²⁴⁰ the statute runs against infant minors of said deceased, and they are barred at the end of seven years.²⁴¹ But possession for five years, unless it is either admitted or found as a fact to be adverse, will not presume a title.²⁴² In Illinois, a person in actual possession under claim or color of title in good faith for seven years, and during all that time paying all taxes, shall be adjudged the legal owner.²⁴³ When parties enter without title or claim, or color of title, such occupation is subservient to the paramount title, as title must be some-

²³³ *Walden v. Gratz*, 1 Wheat. 292, 4 L. Ed. 94.

²³⁴ *Taylor v. Buckner*, 2 A. K. Marsh. (Ky.) 18, 12 Am. Dec. 354; *Kendal v. Slaughter*, 1 A. K. Marsh. (Ky.) 376; *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140.

²³⁵ *Lawrence v. Ballou*, 50 Cal. 258.

²³⁶ *420 Mining Co. v. Bullion Min. Co.*, 9 Nev. 240. As to where ejectment is barred by limitation under the Montana statute, see *Peter v. Stephens*, 11 Mont. 115, 28 Am. St. Rep. 448, 27 Pac. 403.

²³⁷ *Le Roy v. Rogers*, 30 Cal. 229,

89 Am. Dec. 88; *Simson v. Eckstein*, 22 Cal. 580.

²³⁸ *Utah Comp. Laws*, § 180.

²³⁹ *Utah Comp. Laws* 1876, p. 365, § 13.

²⁴⁰ *Utah Comp. Laws* 1876, p. 301, §§ 107, 183.

²⁴¹ *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

²⁴² *Sharp v. Daugney*, 33 Cal. 505; *Stillman v. White Rock Mfg. Co.*, 3 Woodb. & M. 538, Fed. Cas. No. 13446.

²⁴³ *Russell v. Barney*, 6 McLean, 577, Fed. Cas. No. 12152. Compare *Wright v. Mattison*, 18 How. 50, 15 L. Ed. 280.

where.²⁴⁴ In Delaware, an action of ejectment cannot be maintained against a mere trespasser on the ground of possession alone, unless the possession has continued twenty years.²⁴⁵

§ 6319. **Action will not lie.**—In an action of ejectment, if the plaintiff count upon a lease to himself from a person whom the evidence shows to have been dead at the time, it is bad.²⁴⁶

§ 6320. **Expired lease.**—Where the lease under which ejectment is brought has expired before trial, no recovery can be had without amendment.²⁴⁷ Where land was conveyed in fee, reserving a rent charge with a right of re-entry for non-payment, and the grantor died leaving six heirs, it was held that one of said heirs could maintain ejectment for one sixth of said lands for non-payment of rent, without joining the others.²⁴⁸

§ 6321. **Personal representatives.**—The personal representatives of a lessee for years, or his assignees, have an estate in the land, and are entitled to its possession, and may maintain ejectment.²⁴⁹ A plaintiff in ejectment cannot recover when one lessor under whom he claims has conveyed his legal and equitable title to the other, and the right of that other lessor is barred by a former recovery.²⁵⁰

§ 6322. **Possession by tenant.**—A party entering under a lease with bounds, or under a deed, gains a possession only to the extent of the boundaries of the lease or deed. Where the tenant is settled on a patent with intent to gain possession, without limits or bounds, it was held that the landlord's possession thereby ob-

²⁴⁴ Sharp v. Daugney, 33 Cal. 505; Harvey v. Tyler, 2 Wall. 328, 17 L. Ed. 871. As to the rule in Connecticut, see Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13446. As to the rule in Montana, see Peter v. Stephens, 11 Mont. 115, 28 Am. St. Rep. 448, 27 Pac. 403.

²⁴⁵ Doe ex dem. Jefferson v. Howell, 1 Houst. (Del.) 178. For the statutes of limitation of the various states, see Adams on Ejectment, 43

et seq.; and in California, see Code Civ. Proc., §§ 315-328.

²⁴⁶ Connor v. Brady, 1 How. 211, 11 L. Ed. 105.

²⁴⁷ Roe v. Doe, 30 Ga. 608.

²⁴⁸ Cruger v. McClaughry, 51 Barb. 642.

²⁴⁹ Williams on Executors, 748; Roscoe on Actions, 545; Doe v. Bradbury, 16 Eng. Com. L. 115; Mosher v. Yost, 33 Barb. 277.

²⁵⁰ Doe ex dem. Dearmond v. Roe, 30 Ga. 632.

tained extended to the line of the patent.²⁵¹ But an alienee entering upon lands with bounds gains a possession only to the extent of his bounds.²⁵² If the landlord himself enters and is ousted by an intruder, he may recover to the boundaries of his deed, while the tenant, if ousted, can recover only to the boundaries of his lease.²⁵³

§ 6323. **Tax-title.**—No title can be derived from a tax-sale where the tax was levied against the buyer, whose duty it was to pay it.²⁵⁴ A complaint in ejectment consisting of two counts, the first of which attempts to set up a tax-title to the premises, and the second of which contains the usual general allegations, is not liable to a general demurrer. The first part of the complaint may be treated as surplusage, the second part being sufficient to show a cause of action, and the validity of the tax-title need not be determined upon the general demurrer.²⁵⁵ In Colorado, a defendant is not required to allege all the initial proceedings culminating in the issuance of a tax-deed relied on by him as a defense, in order to render such deed admissible.²⁵⁶

§ 6324. **Tenants in common.**—Tenants in common are in possession of all the land held in common, and each and every one of them has the right to enter upon and occupy the whole of the common lands and every part thereof.²⁵⁷ Their occupation shall be, by law, between them in common.²⁵⁸ One tenant in common may maintain an action to recover possession of an undivided part of the land from a cotenant who wrongfully excludes him from possession.²⁵⁹ So one tenant in common can recover possession of the entire premises as against a mere trespasser.²⁶⁰ In Tennessee, the practice has been for the tenants in common in

²⁵¹ Lee v. McDaniel, 1 A. K. Marsh. (Ky.) 234; Owings v. Gibson, 2 A. K. Marsh. (Ky.) 515.

²⁵² Maury v. Waugh, 1 A. K. Marsh. (Ky.) 452; Owings v. Gibson, 2 A. K. Marsh. (Ky.) 515; Jones v. Chiles, 2 Dana (Ky.), 25; Wickliffe v. Ensor, 9 B. Mon. (Ky.) 258.

²⁵³ Walsh v. Hill, 38 Cal. 481.

²⁵⁴ Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Coppinger v. Rice, 33 Cal. 425; followed in Garwood v. Hastings, 38 Cal. 216.

²⁵⁵ Cole v. Segraves, 88 Cal. 103, 25 Pac. 1109.

²⁵⁶ Treasury etc. R. Co. v. Gregory, 38 Colo. 212, 88 Pac. 445.

²⁵⁷ Carpentier v. Webster, 27 Cal. 524.

²⁵⁸ 2 Bouvier's Inst. 314.

²⁵⁹ Frakes v. Elliott, 102 Ind. 47, 1 N. E. 195; Lundy v. Lundy, 131 Ill. 138, 23 N. E. 337.

²⁶⁰ Treat v. Reilly, 35 Cal. 129; Hardy v. Johnson, 1 Wall. 371, 17 L. Ed. 502; Sharon v. Davidson, 4 Nev.

ejectment to declare in a joint demise, and to recover a part or the whole of the premises, according to the evidence.²⁶¹ In Missouri, tenants in common cannot join in an action of ejectment.²⁶²

§ 6325. Tenants in common—Damages.—Where a party, after taking possession wrongfully, became a cotenant of the plaintiff, the plaintiff cannot in ejectment recover damages for the period while he was wrongfully in possession.²⁶³ But a tenant in common who is ousted by his cotenant may recover damages from the time of the ouster according to his right.²⁶⁴ Where the plaintiff is owner of an undivided half-interest, and the defendant, a naked trespasser, purchased an undivided interest after the commencement of the action, plaintiff can recover the value of one half of the rents and profits, including those resulting from the improvements placed on the land by the defendant during the period of wrongful possession.²⁶⁵

§ 6326. Termination of plaintiff's title pending suit.—Where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover damages for withholding the property.²⁶⁶ The conveyance by plaintiff pending suit does not necessarily affect his right to recover; and such conveyance may be shown to be a mortgage, though on its face it is an absolute deed.²⁶⁷ This provision of the statute applies to all cases where the plaintiff's title from any cause ceases to exist before trial, and is not confined to cases in which the title expires by limitation.²⁶⁸ The death of the wife without issue living, after suit brought by herself and the husband for the homestead, defeats the action.²⁶⁹ But the sale of the premises during the action is but a transfer of the cause of action.²⁷⁰ Though

416; *Rowe v. Baegalluppi*, 21 Cal. 633; *Chipman v. Hastings*, 50 Cal. 310, 19 Am. Rep. 655.

²⁶¹ *Poole v. Fleeger*, 11 Pet. 185, 9 L. Ed. 680; affirming *Fleeger v. Poole*, 1 McLean, 185, Fed. Cas. No. 4860.

²⁶² *Dube v. Smith*, 1 Mo. 313; *Wathen v. English*, 1 Mo. 746.

²⁶³ *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135.

²⁶⁴ *Id.* See *Childs v. Kansas City etc. R. R. Co.*, 117 Mo. 414, 23 S. W. 373.

²⁶⁵ *Carpentier v. Mitchell*, 29 Cal. 330.

²⁶⁶ Cal. Code Civ. Proc., § 740; *Moore v. Tice*, 22 Cal. 513.

²⁶⁷ *Clink v. Thurston*, 47 Cal. 21.

²⁶⁸ *Lang v. Wilbraham*, 2 Duer, 171.

²⁶⁹ *Gee v. Moore*, 14 Cal. 472.

²⁷⁰ *Moss v. Shear*, 30 Cal. 469.

where plaintiff's title expired before judgment, if he is entitled to mesne profits, he may have judgment so as to enable him to recover them.²⁷¹

§ 6327. **Title.**—A plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's;²⁷² and only upon the legal title,²⁷³ and upon his title as it was when the suit was commenced.²⁷⁴ A subsequently acquired deed will not aid him.²⁷⁵ This rule has no application to mining claims.²⁷⁶ A duplicate final receipt of the receiver of the United States land office for homestead land entitles the holder to maintain ejectment for possession of the land.²⁷⁷ The plaintiff must show title in himself before the ouster laid in the complaint.²⁷⁸ A legal subsisting title outstanding in another is inconsistent with the title in the plaintiff, and must defeat him.²⁷⁹

§ 6328. **Title and prior possession.**—Where a party relies on documentary title and prior possession, if he fail in the former he may still rely upon the latter. The failure to prove the paper title does not impair the just force and effect of the possession.²⁸⁰ Plaintiff must show a better title than that of defendant, or an actual prior possession, in order to put defendant to the necessity

²⁷¹ Jackson v. Davenport, 18 Johns. 295.

²⁷² Woodworth v. Fulton, 1 Cal. 295; Stanford v. Mangin, 30 Ga. 355; Turner v. Aldridge, 1 McAll. 229, Fed. Cas. No. 14249; Sahler v. Signer, 37 Barb. 329; Brady v. Henmon, 8 Bosw. 528; State v. Stringfellow, 2 Kan. 263; Seabury v. Field, 1 McAll. 1, Fed. Cas. No. 12574; Mather v. Walsh, 107 Mo. 121, 17 S. W. 755; Parker v. Cassingham, 130 Mo. 348, 32 S. W. 487; Wentworth v. Abbetts, 78 Wis. 63, 46 N. W. 1044; Finelite v. Sinnott, 25 Jones & Sp. 57; Harrison v. Gallegos, 13 N. Mex. 1, 79 Pac. 300; Humphries v. Sorensen, 33 Wash. 563, 74 Pac. 690; George v. Columbia etc. Ry., 38 Wash. 480, 80 Pac. 767.

²⁷³ Buhne v. Chism, 48 Cal. 467; Barrett v. Hineckley, 124 Ill. 32, 7 Am. St. Rep. 331, 14 N. E. 863.

²⁷⁴ Sacramento Sav. Bank v. Hynes, 50 Cal. 195.

²⁷⁵ Joy v. Berdell, 25 Ill. 537; Washington v. Oregon, 1 Black, 459, 17 L. Ed. 203; Johnson v. Adelman, 35 Ill. 265; Pitkin v. Yaw, 13 Ill. 251; Carn v. Haisley, 22 Fla. 317. For exceptions to the maxim that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's, see Macklot v. Dubrueil, 9 Mo. 473, 43 Am. Dec. 550.

²⁷⁶ Richardson v. McNulty, 24 Cal. 339.

²⁷⁷ McClung v. Penny, 12 Okla. 303, 70 Pac. 404.

²⁷⁸ Buxton v. Carter, 11 Mo. 481.

²⁷⁹ See Puterbaugh's Pl. & Pr. (Ill.) citing Masterson v. Cheek, 23 Ill. 75; McCormick v. Wilcox, 25 Ill. 277.

²⁸⁰ Morton v. Folger, 15 Cal. 275.

of supporting his possession by a title superior to that of naked possession.²⁸¹

§ 6329. **Title, allegation of.**—The title of the plaintiff is the ultimate fact, the fact in issue upon which the recovery must be had in ejectment,²⁸² and must be alleged in the complaint.²⁸³ The allegation that the plaintiff is “the owner” of the property is of an ultimate fact, unless the context shows that it was intended as a mere conclusion from the facts stated.²⁸⁴ The title may be averred in general terms, but if he attempts to set forth a specific deraignment, he must aver every fact required to be proved in order to recover,²⁸⁵ and he will be confined in the proof to his pleading.²⁸⁶ Plaintiff relying upon a reversion must allege how and when the title reverted.²⁸⁷ An allegation that on a day named the plaintiff “was possessed of” certain lands therein described, which said premises the plaintiff claims in fee simple absolute, is an allegation of title in fee simple absolute.²⁸⁸ The allegation of possession at the time of the ouster complained of is a sufficient allegation of title.²⁸⁹ So an averment of the prior possession and ouster is sufficient.²⁹⁰

§ 6330. **Title, equitable.**—Ejectment cannot be maintained upon an equitable title.²⁹¹ A mere equitable title to land does not enable the owner to maintain an action to recover possession thereof. Although the code has abolished the distinction between actions at law and suits in equity, so far as regards forms, the rules by which the rights of parties are to be determined remain

²⁸¹ *Harrison v. Gallegos*, 13 N. Mex. 1, 79 Pac. 300.

²⁸² *Marshall v. Shafter*, 32 Cal. 176; *Payne v. Treadwell*, 16 Cal. 243.

²⁸³ *Gray v. James*, Pet. C. C. 476, Fed. Cas. No. 5719.

²⁸⁴ *Heeser v. Miller*, 77 Cal. 192, 19 Pac. 375.

²⁸⁵ *Castro v. Richardson*, 18 Cal. 478; *Hutchinson v. McNally*, 85 Cal. 619, 24 Pac. 1071.

²⁸⁶ *Eagan v. Delaney*, 16 Cal. 85; *Coryell v. Cain*, 16 Cal. 567.

²⁸⁷ *Bothwell v. Denver Union Stockyard Co.*, 39 Colo. 221, 90 Pac. 1127.

²⁸⁸ *Marshall v. Shafter*, 32 Cal. 176.

²⁸⁹ *Hutchinson v. Perley*, 4 Cal. 33, 60 Am. Dec. 578; approved in *Winans v. Christy*, 4 Cal. 78, 60 Am. Dec. 597; *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 579; *Nagle v. Macy*, 9 Cal. 427; *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810.

²⁹⁰ *Boles v. Cohen*, 15 Cal. 150; *Norris v. Russell*, 5 Cal. 249.

²⁹¹ *O'Connell v. Dougherty*, 32 Cal. 458; *Seaton v. Son*, 32 Cal. 481; *San Felipe M. Co. v. Belshaw*, 49 Cal. 655; *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

unchanged; and in an action against a stranger in possession, the plaintiff can only recover on his legal title.²⁹² Under the code system of procedure, a plaintiff may allege and prove the facts showing himself the equitable owner of land, and thereupon recover the possession thereof as against the holder of the naked legal title or a stranger. But he must by his complaint exhibit the nature of his title, and the law has not dispensed with the necessity of pleading the facts showing his equitable title.²⁹³ And a legal title will prevail in the absence of a valid equitable defense;²⁹⁴ but the superior title will prevail, whether it be a legal or an equitable title.²⁹⁵

§ 6331. Title derived through a firm.—In deriving title through a firm the members of which are not parties, it is not necessary to set out their names.²⁹⁶

§ 6332. Title by sheriff's deed.—The sheriff is empowered by law to convey by deed to the purchaser under an execution all the right, title, interest, and estate of the defendant,²⁹⁷ as fully as the defendant himself, or an attorney empowered by him for that purpose, could have done. The officer in fact acts as such attorney, appointed for that purpose by law.²⁹⁸

§ 6333. Title subsequently acquired.—A party may have two suits against the same defendant, if the second is brought on a title acquired after the commencement of the first.²⁹⁹

292 *Shewen v. Wroot*, 5 East, 132; *Jackson v. Pierce*, 2 Johns. 221; *Jackson v. Chase*, 2 Johns. 84; *Moore v. Spellman*, 5 Denio, 225; *Peck v. Newton*, 46 Barb. 173; *Carson v. Boudinot*, 2 Wash. C. C. 33, Fed. Cas. No. 2462; *Hickey v. Stewart*, 3 How. 750, 11 L. Ed. 814; *Agricultural Bank of Mississippi v. Rice*, 4 How. 225, 11 L. Ed. 949; *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873.

293 *Merrill v. Dearing*, 47 Minn. 137, 49 N. W. 693; *Crary v. Goodman*, 12 N. Y. 266, 64 Am. Dec. 506; *Hoppough v. Struble*, 60 N. Y. 430.

294 *Hartley v. Brown*, 51 Cal. 465. See *Hyde v. Mangan*, 88 Cal. 319, 26 Pac. 180.

295 *State v. Johanson*, 26 Wash. 668, 67 Pac. 401.

296 *Cochran v. Scott*, 3 Wend. 229. 297 4 Scam. 531.

298 See *Dodge v. Walley*, 22 Cal. 224, 83 Am. Dec. 61; *McDonald v. Badger*, 23 Cal. 399, 83 Am. Dec. 123; *Lessee of Cooper v. Galbraith*, 3 Wash. C. C. 550, Fed. Cas. No. 3193; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441. As to recitals in sheriff's deed, see *Donahue v. McNulty*, 24 Cal. 417, 85 Am. Dec. 78; *Hihn v. Peck*, 30 Cal. 287. As to title conveyed by such deed, see *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441, and cases there cited.

299 *Vance v. Olinger*, 27 Cal. 358.

§ 6334. **Title under sheriff's sale.**—Where the plaintiff's complaint in ejectment averred title in the plaintiff under a sheriff's sale made by one sheriff and a deed executed by his successor, it was held that the plaintiff could not recover.³⁰⁰ The plaintiff having a sheriff's title need not show that the defendant in execution had title, but only that he was in possession at the time of the sale.³⁰¹ He need only show a judgment, execution, and a sheriff's deed.³⁰²

§ 6335. **Two titles.**—Where one enters generally under two titles, the law adjudges that he entered under the better title of the two.³⁰³

§ 6336. **United States courts.**—The petitory action in the United States courts corresponds with the action of ejectment in the state courts.³⁰⁴

§ 6337. **Value.**—Where the value of the matter in dispute is not averred in the complaint, evidence cannot be given of it by the defendant.³⁰⁵ *Contra*, when the pleadings do not state the value of the property in controversy, the value may be shown at the trial.³⁰⁶

§ 6338. **Vendor of land.**—When a vendor elects to rescind the contract of sale for non-compliance with its terms, he may bring ejectment against the purchaser.³⁰⁷ Where a party acquires possession of land under an executory contract of purchase, the vendor cannot maintain ejectment until after notice to quit or demand of possession.³⁰⁸ And in such instance it is proper, upon

³⁰⁰ *Alderson v. Bell*, 9 Cal. 315; *Kellogg v. Kellogg*, 6 Barb. 116; *Brewster v. Striker*, 1 E. D. Smith, 321; *Townshend v. Wesson*, 4 Duer, 342. See *Farmers' Bank of Saratoga County v. Merchant*, 13 How. Pr. 10.

³⁰¹ *Hartley v. Ferrell*, 9 Fla. 374; citing *Whately v. Newsom*, 10 Ga. 74.

³⁰² *Sinclair v. Worthy*, 1 Wins. (60 N. C.) 114, 84 Am. Dec. 357. See *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050.

³⁰³ *Gardner v. Sharp*, 4 Wash. C. 609, Fed. Cas. No. 5236.

³⁰⁴ *United States v. King*, 7 How. 846, 12 L. Ed. 934; *Livingston v. Story*, 9 Pet. 632, 9 L. Ed. 255; *Gilmer v. Poindexter*, 10 How. 257, 13 L. Ed. 411.

³⁰⁵ *Lanning v. Dolph*, 4 Wash. C. 624, Fed. Cas. No. 8073.

³⁰⁶ *Beard v. Federy*, 3 Wall. 488, 18 L. Ed. 88.

³⁰⁷ *Dean v. Comstock*, 32 Ill. 173; *Belger v. Sanchez*, 137 Cal. 614, 70 Pac. 738.

³⁰⁸ *Johnson v. County of Stark*, 24 Ill. 91; *Dean v. Comstock*, 32 Ill. 173.

cross-complaint of defendant, to allow defendant for the money paid on the contract, less the reasonable rental of the premises, but not to leave defendant in possession also.³⁰⁹ Or a vendor may have a decree for sale of the land to satisfy his vendor's lien, without a prayer for equitable relief.³¹⁰ To maintain ejectment, where time is not of the essence of the contract, the contract must have been abandoned.³¹¹ After the purchaser has perfected his title to the lands in pursuance of the contract, an action will not lie against him by a grantee of the sheriff, under a judgment against the devisee of the vendor.³¹² But where he enters holding a bond for a deed of the usual form, and fails to comply with the terms of the purchase, the vendor may rescind the contract and maintain ejectment.³¹³

§ 6339. **Vermont.**—For cause of action, a party who would avail himself of the bar of the statute of limitations, must show that there had been an actual ouster by some person entering into possession adversely to the plaintiff. A mere intruder without title is not protected.³¹⁴

§ 6340. **When the action lies.**—Ejectment may be brought against claimants not in possession.³¹⁵ Ejectment will not lie for anything whereon an entry cannot be made, or of which the sheriff cannot deliver possession.³¹⁶ But it will lie for anything attached to the soil, of which the sheriff can deliver possession.³¹⁷ So it will lie for a room in a building, although the walls have been taken down, and in form, character, and value, the identity of the premises has been entirely destroyed.³¹⁸ It will lie whenever a right of entry exists. The thing claimed should be a corporeal hereditament.³¹⁹ And the interest should be visible and

309 *Belger v. Sanchez*, 137 Cal. 614, 70 Pac. 738.

310 *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040.

311 *Brixen v. Jorgensen*, 28 Utah, 290, 107 Am. St. Rep. 720, 78 Pac. 674.

312 *Smith v. Gage*, 41 Barb. 60.

313 *Dean v. Comstock*, 32 Ill. 173.

314 *Society for Propagation v. Town of Pawlet*, 4 Pet. 480, 7 L. Ed. 927; *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 140.

315 See *Harvey v. Tyler*, 2 Wall. 329, 17 L. Ed. 871.

316 *Adams on Ejectment*, 18; *Falmouth v. Alderson*, 1 Mees. & W. 210; *Crocker v. Fothergill*, 2 Barn. & Ald. 652; *Child v. Chappell*, 9 N. Y. 246.

317 *Jackson ex dem. Saxton v. May*, 16 Johns. 184; *City of Racine v. Crottsenberg*, 61 Wis. 481, 50 Am. Rep. 149, 21 N. W. 520.

318 *Rowan v. Kelsey*, 2 Keyes, 594. See, also, *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309.

319 *Adams on Ejectment*, 18.

tangible, so that the sheriff may deliver possession to the plaintiff.³²⁰

§ 6341. **When action may be maintained.**—The rule that the claimant in ejectment must recover upon the strength of his own title, is in California so far modified that a plaintiff may recover upon proof of a possession prior to that of the defendants, notwithstanding the real title is in a stranger.³²¹ On a title to land by estoppel, ejectment may be maintained;³²² or under a grant accompanied by possession;³²³ or under a United States patent.³²⁴ In Pennsylvania, a warrant accompanied by payment of the purchase money and a legal survey entitles the holder to sue in ejectment.³²⁵

§ 6342. **When action will not lie.**—The sale of lands in the city of San Francisco, by a portion of the board of commissioners of the funded debt, does not pass a title upon which ejectment will lie.³²⁶ Nor will a deed of the sheriff of premises claimed as a homestead at an execution sale, for the excess of the value of the premises over five thousand dollars.³²⁷ Ejectment does not lie to try the right to a road or right of way.³²⁸ The holder or assignee of a grant issued by a California governor, without approval by the departmental assembly, or judicial possession, cannot in ejectment recover from the conferee of the federal government having an approved survey.³²⁹ A party who has a right of entry upon

³²⁰ Adams on Ejectment, 18; Rowan v. Kelsey, 18 Barb. 484; Champlain etc. R. R. Co. v. Valentine, 19 Barb. 484.

³²¹ Hubbard v. Barry, 21 Cal. 321; approved in Richardson v. McNulty, 24 Cal. 348; Harris v. McGregor, 29 Cal. 129; Southmayd v. Henley, 45 Cal. 101.

³²² Stoddard v. Chambers, 2 How. 284, 11 L. Ed. 269.

³²³ Boyreau v. Campbell, 1 McAll. 119, Fed. Cas. No. 1760. That a grant from the state will support ejectment, see Blakslee Mfg. Co. v. Blakslee etc. Iron Works, 59 Hun, 209, 13 N. Y. Supp. 493.

³²⁴ Ballance v. Forsyth, 13 How. 18, 14 L. Ed. 32.

³²⁵ Sims v. Irvine, 3 Dall. 425, 1 L. Ed. 665; Lewis v. Meredith, 3

Wash. C. C. 81, Fed. Cas. No. 8328; Penns v. Klyne, 1 Wash. C. C. 207, Fed. Cas. No. 10935; Dubois v. Newman, 4 Wash. C. C. 74, Fed. Cas. No. 4108; Vanhorn v. Chesnut, 2 Wash. C. C. 160, Fed. Cas. No. 16856; Copley v. Riddle, 2 Wash. C. C. 354, Fed. Cas. No. 3214.

³²⁶ Leonard v. Darlington, 6 Cal. 123.

³²⁷ Gary v. Eastabrook, 6 Cal. 457.

³²⁸ Wood v. Truckee T. Co., 24 Cal. 474. See Adams on Ejectment, 18 et seq. That ejectment will lie for the recovery of lands claimed and condemned as the roadbed and right of way of a railroad, see Tennessee etc. R. R. Co. v. East Alabama R. R. Co., 75 Ala. 516, 51 Am. Rep. 475.

³²⁹ Estrada v. Murphy, 19 Cal. 248.

lands, and who has entered by force or fraud, cannot be turned out of possession by an action of ejectment.³³⁰

§ 6343. **Heir of devisee.**—A person in possession of land, without other title, has a devisable interest, and the heir of his devisee can maintain ejectment against one who has entered on the land and cannot show title or possession prior to the testator.³³¹ An averment that the defendant's ancestor was in his lifetime seised in fee, and in possession of, etc., sufficiently avers the fact of title in him, and a proof of grants to him is admissible under it.³³²

§ 6344. **Title.**—An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship.³³³ Under the old law in California, a devisee could not maintain ejectment until the distribution and close of the estate.³³⁴ But, by section 1452 of the Code of Civil Procedure, the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same, against any one except the executor or administrator. An infant heir, notwithstanding the invalidity of probate proceedings, may recover his interest in the real property and possession thereof, except as against the administrator.³³⁵

§ 6345. **Tender of price to trustee.**—A decedent claimed and exercised acts of ownership over a tract of land for some time before and up to his death. His possession descended to his heirs as tenants in common. One of them, who was also executor of his will, directed to sell the decedent's land, bought the land from a third person claiming to hold a perfect title. In ejectment against him, it was not necessary that a tender of the purchase money should be made before commencing suit, as defendant claimed in opposition to the trust.³³⁶

³³⁰ *Depuy v. Williams*, 26 Cal. 309.

³³¹ *Asher v. Whitlock*, L. R., 1 Q. B. 1.

³³² *People v. Livingston*, 8 Barb. 253. As to allegation of heirship, see *St. John v. Northrup*, 23 Barb. 25.

³³³ *Castro v. Armesti*, 14 Cal. 39.

³³⁴ *McCrea v. Haraszthy*, 51 Cal. 146.

³³⁵ *Phelan v. Smith*, 100 Cal. 158, 34 Pac. 667.

³³⁶ *Keller v. Auble*, 58 Pa. St. 410, 98 Am. Dec. 297.

§ 6346. **Abandonment.**—Laying off land into town lots, selling the same, and exercising other acts of ownership over them, is no evidence of abandonment, but, taken in connection with previous acts of ownership, furnishes additional evidence of possession.³³⁷ Persons in casual and temporary occupancy of an island, a part of the public domain, engaged in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, are not justified in resisting by force others who attempt to land upon it to engage in the same pursuit.³³⁸

§ 6347. **Actual possession.**—By actual possession is meant a subjection to the will and dominion of the claimant, and it is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property.³³⁹ The mere taking from the land of a portion of the herbage growing thereon is not sufficient to give a right of possession.³⁴⁰ A complaint in ejectment averring that plaintiff was in the actual possession of the premises by inclosure and cultivation, that defendant, upon a certain day, entered upon the same and ousted the plaintiff, and that defendant is still in possession, is sufficient.³⁴¹ The possession need not be by the claimant personally, but possession by a tenant under him inures to his benefit.³⁴² What is actual and what constructive possession in many cases must be a question for the jury.³⁴³ One in actual possession may rely on his possession alone until the opposite party shows a better right.³⁴⁴ So one in actual possession cannot be dispossessed by another who has neither title nor color of title.³⁴⁵ Where land has been cultivated for two years, and was at the time in possession of an agent, the same is conclusive evidence of actual possession.³⁴⁶ Proof of possession, however short, will entitle a claimant to recover.³⁴⁷ So the use of property for a series of years, without direct proof of

³³⁷ *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599.

³³⁸ *People v. Batcheler*, 27 Cal. 69, 85 Am. Dec. 231.

³³⁹ *Coryell v. Cain*, 16 Cal. 567.

³⁴⁰ *Steinback v. Fitzpatrick*, 12 Cal. 295.

³⁴¹ *Godwin v. Stebbins*, 2 Cal. 103; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323; *Boles v. Weifenback*, 15 Cal. 144; *Boles v. Cohen*, 15 Cal. 151.

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³⁴² *Gregg v. Forsyth*, 24 How. 179, 16 L. Ed. 731; *Gregg v. Tesson*, 1 Black, 150, 17 L. Ed. 74; *Dredge v. Forsyth*, 2 Black, 563, 17 L. Ed. 253.

³⁴³ *O'Callaghan v. Booth*, 6 Cal. 63.

³⁴⁴ *Hawxhurst v. Lander*, 28 Cal. 331.

³⁴⁵ *Sunol v. Hepburn*, 1 Cal. 254.

³⁴⁶ *Moore v. Goslin*, 5 Cal. 266.

³⁴⁷ *Potter v. Knowles*, 5 Cal. 87.

the character of the fence or its efficiency, was held sufficient.³⁴⁸ Inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights; nor is it necessary as notice to those who have received actual notice of the intended line of the canal.³⁴⁹

§ 6348. **Occupation—Constructive possession.**—The word “occupation” may be so used in connection with other expressions, or under peculiar facts of a case, as to signify a residence. But ordinarily the expressions “occupation,” “*possessio pedis*,” and “subjection to the will and control,” are employed as synonymous terms, and as signifying actual possession.³⁵⁰ The possession of real property is of two kinds, the one constructive, depending upon the title and the right to the actual possession, and the other subsisting in the actual occupation.³⁵¹ A party may be in possession of land without a personal residence thereon, or without having personally cultivated it.³⁵² Possession coupled with color of title must prevail in ejectment, except where a better title is shown in the defendants.³⁵³

§ 6349. **Possession of part.**—The actual possession of a small portion of a large tract, with a claim of title to the whole, will not enable a party to maintain a possessory action under Mexican law, where it appears on the face of the papers that his title is a nullity.³⁵⁴ Where each of the parties has held possession of distinct parts of the land in controversy, the party having the better right is in constructive possession of all the land not occupied in fact by his adversary.³⁵⁵

§ 6350. **Possession, extent of.**—A mere intruder is limited to his actual possession;³⁵⁶ but one entering land under a deed or title has a possession coextensive with his deed or title, with some qualifications, and his possession is not always confined to his

348 *Hestres v. Brannan*, 21 Cal. 423.

349 *Conger v. Weaver*, 6 Cal. 548, 65 Am. Dec. 528.

350 *Lawrence v. Fulton*, 19 Cal. 683.

351 *Cahoon v. Marshall*, 25 Cal. 197.

352 *Plume v. Seward*, 4 Cal. 94, 60 Am. Dec. 599; *Barstow v. Newman*, 34 Cal. 90.

353 *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

354 *Sunol v. Hepburn*, 1 Cal. 254.

355 *Green v. Liter*, 8 Cranch, 229, 3 L. Ed. 545; *Hunt v. Wickliffe*, 2 Pet. 201, 7 L. Ed. 397; *Barr v. Gratz*, 4 Wheat. 213, 4 L. Ed. 553.

356 *Sunol v. Hepburn*, 1 Cal. 254; *Wilson v. Corbier*, 13 Cal. 166; *Watkins v. Holman*, 16 Pet. 25, 10 L. Ed. 873. See Cal. Code Civ. Proc., §§ 321-327.

actual inclosure.³⁵⁷ So where a party takes possession of part of a tract, under a deed of conveyance to the whole, with specific boundaries, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed.³⁵⁸ This rule is not limited to small tracts of land such as are usually occupied and cultivated for farms;³⁵⁹ and it extends to unrecorded deeds, with respect to those at least who have actual knowledge of the terms of the deed and the grantee's claim under it.³⁶⁰ But if the title includes no definite metes and bounds, possession will not be deemed to extend beyond the actual possession proved.³⁶¹ And a grantee entering into possession under a deed, thereby acquires no greater possession than his grantor had.³⁶²

§ 6351. **Possession, insufficient.**—Where a party takes possession of land, and incloses it with a fence consisting of posts seven feet apart, and one board six inches wide nailed to the posts, and not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract under a deed to the whole.³⁶³

§ 6352. **Possessory act.**—A party relying on the possessory act of California must show compliance with its provisions, and can then maintain an action for the possession of lands occupied for cultivation or grazing, without showing an actual possession, or an actual inclosure of the whole claim.³⁶⁴

§ 6353. **Possession of mineral lands.**—Where a person has been in adverse, open, and notorious possession of unpatented mining property, claiming possession under a deed purporting to convey title for more than five years, an action against him to recover pos-

³⁵⁷ *Castro v. Gill*, 5 Cal. 40; *Green v. Litter*, 8 Cranch, 229, 3 L. Ed. 545; *Barr v. Gratz*, 4 Wheat. 213, 4 L. Ed. 553; *Ellicott v. Pearl*, 10 Pet. 412, 9 L. Ed. 475; affirming 1 McLean, 206, Fed. Cas. No. 4386; *Prescott v. Nevers*, 4 Mason, 326, Fed. Cas. No. 11390.

³⁵⁸ *Rose v. Davis*, 11 Cal. 133; *Baldwin v. Simpson*, 12 Cal. 560; *Kile v. Tubbs*, 23 Cal. 431; *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103;

McKee v. Greene, 31 Cal. 418; *Ayers v. Bensley*, 32 Cal. 620.

³⁵⁹ *Hicks v. Coleman*, 25 Cal. 122, 85 Am. Dec. 103.

³⁶⁰ *Roberts v. Unger*, 30 Cal. 676.

³⁶¹ *Fraser v. Hunter*, 5 Cranch C. 470, Fed. Cas. No. 5063.

³⁶² *Bird v. Dennison*, 7 Cal. 297.

³⁶³ *Baldwin v. Simpson*, 12 Cal. 560. See, also, *Hughes v. Hazard*, 42 Cal. 149.

³⁶⁴ *Coryell v. Cain*, 16 Cal. 567.

session is barred.³⁶⁵ It is not necessary, in order to constitute possession, that parties entering on unsurveyed government mineral land be actually on the property at the time of wrongful entry by strangers.³⁶⁶

§ 6354. **Mineral lands—Continued.**—The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining.³⁶⁷ In ejectment for mineral land, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. Defendants answered denying the possession of plaintiff and the ouster, and averred that the land was public land of the United States, valuable for mining, and that they entered for that purpose. Plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; he could not recover on the pleadings, because the character of his possession did not appear—the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever.³⁶⁸ Where, in a suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title.³⁶⁹

§ 6355. **Mineral lands, location on.**—One party may locate grounds for fluming purposes, and another party, at the same time, or at a different time, may locate the same ground for mining purposes, and the two locations will not conflict.³⁷⁰

§ 6356. **Mining claims—Appropriation of.**—The usual mode of taking up mining claims is to put upon the claim a written notice that the party has located it; and this may be done personally, or

³⁶⁵ Utah Rev. Stats. 1887, § 4036;
Bradley v. Johnson, 11 Idaho, 689,
83 Pac. 927.

³⁶⁶ Davis v. Dennis, 43 Wash. 54,
85 Pac. 1079.

³⁶⁷ Smith v. Doe, 15 Cal. 100.

³⁶⁸ Id.

³⁶⁹ Eagan v. Delaney, 16 Cal. 87.

³⁷⁰ O'Keiffe v. Cunningham, 9 Cal.
589.

by any one for him; and when done by an agent the title vests in him, and the agent cannot subsequently divest it.³⁷¹ The acts of appropriation are regarded by mining rules and local custom, which, when not in conflict with the laws of the state, must govern all decisions in an action for mining claims.³⁷²

§ 6357. **Mining claims—Constructive possession.**—The entry on a part of a mining claim under a deed does not by the deed alone give possession of the entire claim, unless the deed contains definite and certain boundaries which can be traced out and made known from the deed alone.³⁷³ But when a person enters *bona fide*, under color of title, the possession of part, as against any one but the true owner, is the possession of the whole, as described in the deed or lease.³⁷⁴ When the claim is defined, and the party enters in pursuance of mining rules and customs, the possession of part is the possession of the whole.³⁷⁵ But the boundaries must be plainly indicated by marks or monuments.³⁷⁶ Fencing a mining claim would only serve to mark its boundaries; and any other means which will accomplish that object will equally answer the requirements of the law as to possession.³⁷⁷ And this rule is equally applicable to claims valuable only for the “tailings” deposited on them from other mines.³⁷⁸

§ 6358. **Mining claims—Extent of.**—In the absence of mining regulations, the fact that a party has located a claim bounded by another raises no implication that the last location corresponds in size or in the direction of its lines with the former.³⁷⁹ One may follow a vein apexing in his claim through the land of an adjoining claim and may sue in ejectment to assert such extralateral

³⁷¹ Gore v. McBrayer, 18 Cal. 582.

³⁷² Cal. Code Civ. Proc., § 748. See Hicks v. Bell, 3 Cal. 219; Packer v. Heaton, 9 Cal. 568; Waring v. Crow, 11 Cal. 366; English v. Johnson, 17 Cal. 108, 76 Am. Dec. 574; Gore v. McBrayer, 18 Cal. 582; Prosser v. Parks, 18 Cal. 47; Colman v. Clements, 23 Cal. 245; St. John v. Kidd, 26 Cal. 263; Morton v. Solambo C. M. Co., 26 Cal. 527; Table Mountain Tunnel Co. v. Stranahan, 31 Cal. 387.

³⁷³ Hess v. Winder, 30 Cal. 349.

³⁷⁴ Attwood v. Fricot, 17 Cal. 37, 76 Am. Dec. 567.

³⁷⁵ English v. Johnson, 17 Cal. 107, 76 Am. Dec. 574.

³⁷⁶ Hess v. Winder, 30 Cal. 349; Deeney v. Mineral Creek Milling Co., 11 N. Mex. 279, 67 Pac. 724; U. S. Rev. Stats., § 2319, 2322, 2324; Wright v. Lyons, 45 Or. 167, 77 Pac. 81.

³⁷⁷ Rogers v. Cooney, 7 Nev. 213.

³⁷⁸ Id.

³⁷⁹ Live Yankee Co. v. Oregon Co., 7 Cal. 40.

rights.³⁸⁰ The quantity of ground a miner may locate for mining purposes may be limited by the mining rules of the district.³⁸¹ And a general custom, whether existing anterior to the location or not, may be given in evidence; but a local rule stands on a different footing, and cannot be introduced to affect the value of a claim acquired previous to its establishment.³⁸²

§ 6359. **Mining claims—How held.**—A mining claim on the public domain may be held either by actual occupancy and the exercise of control over it, by indicating its boundaries by monuments or marks, or by occupancy in accordance with local mining customs.³⁸³ Where the location is made both by posting notices and by designating fixed objects on or near its exterior boundaries, witness may state whether the location made included the grounds in dispute.³⁸⁴ One seeking to hold a mining claim by virtue of prior possession alone, without reference to local mining customs, must mark out his boundaries by such distinct physical marks as will indicate to any one what his exterior boundaries are.³⁸⁵ But fences are not necessary.³⁸⁶

§ 6360. **Mining claims—Ownership of.**—The whole course of legislation and judicial decisions since the organization of the state has recognized a qualified ownership of the mines in private individuals.³⁸⁷ Plaintiff can recover only upon strength of his own title; and if he fails to show title to the claim, it is immaterial that defendant has none.³⁸⁸ Where neither party to an action for trespass on a mining claim has a perfect right to a conveyance from the government, right of possession is the only issue.³⁸⁹ As between themselves and all other persons except the United States, miners in possession of claims are owners of the same, having a vested right of property founded on possession and appropriation.³⁹⁰ A pleading not containing a general averment of ownership of a mining claim must aver all the facts necessary to con-

380 *Davis v. Shepherd*, 31 Colo. 141, 72 Pac. 57.

381 *Prosser v. Parks*, 18 Cal. 47.

382 *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198.

383 *Hess v. Winder*, 30 Cal. 349.

384 *Kelly v. Taylor*, 23 Cal. 11.

385 *Hess v. Winder*, 30 Cal. 349.

386 *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

387 *State v. Moore*, 12 Cal. 56.

388 *Schroder v. Aden Gold Min. Co.*, 144 Cal. 628, 78 Pac. 20.

389 *Columbia Copper Min. Co. v. Duchess etc. Co.*, 13 Wyo. 244, 79 Pac. 385.

390 *Hughes v. Devlin*, 23 Cal. 501.

stitute such ownership. An averment that the land was vacant public land, and that a notice of location was posted thereon, is not sufficient.³⁹¹

§ 6361. Mining claims—Possession of.—Mining ground acquired by entry under a claim for mining purposes, the bounds being distinctly defined, accompanied by actual occupancy of a part of the tract, is sufficient possession to maintain ejectment for the entire claim, although the acts of appropriation were not according to the mining rule.³⁹² So, also, the owner of an undivided interest is entitled to the possession of the whole mine as against one who has no title to any portion.³⁹³ The rule applicable to agricultural lands does not apply.³⁹⁴ A miner is not expected to reside on his claim, or to cultivate it, or to inclose it, work done outside the claim, in reasonable proximity thereto, having direct relation to the working of the claim, being sufficient;³⁹⁵ as, for example, starting a tunnel a considerable distance off, to run into the claim,³⁹⁶ is sufficient possession. Mining claims are held by possession, regulated and defined by usage and local and conventional rules, and the "actual possession" which is applied to agricultural lands, and understood to be a *possessio pedis*, cannot be required in the case of a mining claim.³⁹⁷

§ 6362. Mining claims—Sale of.—In an early California case,^{397a} it was held that a bill of sale not under seal was insufficient to convey a mining claim; but it has been since held that instruments conveying mining claims need not be under seal.³⁹⁸ And where it is conveyed by bill of sale, the bill of sale is the best evidence of the transfer, parol evidence of the conveyance being inadmissible.³⁹⁹ And if the bill of sale be lost or destroyed, its loss or destruction must be proved, to lay the foundation for secondary evidence as to its contents.⁴⁰⁰ Under a conditional sale

³⁹¹ *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200. See, also, *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076.

³⁹² *Table Mountain Tunnel Co. v. Stranahan*, 20 Cal. 198.

³⁹³ *Melton v. Lambard*, 51 Cal. 258.

³⁹⁴ *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

³⁹⁵ *McGarrity v. Byington*, 12 Cal. 426.

³⁹⁶ *English v. Johnson*, 17 Cal. 107, 76 Am. Dec. 574.

³⁹⁷ *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567.

^{397a} *McCarran v. O'Connell*, 7 Cal. 152.

³⁹⁸ *Draper v. Douglas*, 23 Cal. 347; *St. John v. Kidd*, 26 Cal. 263.

³⁹⁹ *Crary v. Campbell*, 24 Cal. 634.

⁴⁰⁰ *King v. Randlett*, 33 Cal. 318.

making the claim revert to the vendor on failure to make payments, ejectment may be had to regain possession without rescinding the contract and offering to return the money paid.⁴⁰¹

§ 6363. **Mining claims—Verbal sale of.**—Where the grantor is in actual possession of a mining claim, he may convey the same by a verbal sale, accompanied by a transfer of the possession.⁴⁰² This was held in California before the act of 1860,^{402a} but since the act of 1860 all sales of mining claims must be in writing.⁴⁰³

§ 6364. **Mining regulations.**—The mining regulations of a district are devised for the purpose of enabling persons who locate claims to hold them by constructive possession, and they are not to be construed as authorizing a person to invade the actual possession of another, on the pretext that the latter has neglected to perform the requisite amount of work, or has failed in some other respect to comply with such regulations; and the language, "open and subject to appropriation under the local usages of the district," does not necessarily imply that a mining claim in the actual possession of a person may be relocated by another person on his failure to perform the acts required by the mining regulations of the district.⁴⁰⁴

§ 6365. **Actual possession.**—The plaintiff who claims to recover on the ground of prior possession alone, without color of title, must show an actual prior possession; and if he shows that he had the land protected by a substantial inclosure, even if he had not improved or lived on it, this constitutes an actual possession.⁴⁰⁵ Where a plaintiff seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in the state, he can only recover upon proof of actual *bona fide* occupation.⁴⁰⁶

⁴⁰¹ Williams v. Long, 139 Cal. 186, 72 Pac. 911.

⁴⁰² Gatewood v. McLaughlin, 23 Cal. 178; Antoine Co. v. Ridge Co., 23 Cal. 219; Copper Hill Min. Co. v. Spencer (No. 2), 25 Cal. 18; Patterson v. Keystone Min. Co., 23 Cal. 575.

^{402a} Stats. 1860, p. 175.

⁴⁰³ See Patterson v. Keystone Min. Co., 30 Cal. 360, where the question of the sufficiency of a verbal sale under

the act is discussed. In Goller v. Fett, 30 Cal. 481, it was held that a verbal sale, even if accompanied by delivery of possession, does not pass the legal title. See, also, Cal. Civ. Code, § 1091; Melton v. Lambard, 51 Cal. 258.

⁴⁰⁴ Bradley v. Lee, 38 Cal. 367.

⁴⁰⁵ Polack v. McGrath, 32 Cal. 15.

⁴⁰⁶ Murphy v. Wallingford, 6 Cal. 648.

§ 6366. **Entry upon lands.**—One who enters upon a tract of land where there is no adverse possession, a portion of which is uninclosed, claiming the whole under a deed describing the entire tract, will prevail in an action against one who enters subsequently upon the uninclosed part, showing color of title merely.⁴⁰⁷

§ 6367. **Presumption of title.**—Where two parties rely upon possession solely as proof of title, the presumption of ownership is in favor of the first possessor.⁴⁰⁸ And where title to land rests in possession only, the prior possessor has the better title.⁴⁰⁹

§ 6368. **Prior possession.**—Prior possession will prevail in ejectment over a subsequent one obtained by mere entry, without any lawful right.⁴¹⁰ A locator on public land, who shows that he first entered upon it, marked out the boundaries, and diligently proceeded to do, or diligently made preparation to do, such acts as were necessary to constitute an actual possession, will be entitled, even without showing an actual possession, to recover against a person subsequently entering.⁴¹¹ Where the plaintiff has documentary title, aided and accompanied by possession, and the defendant is a mere trespasser, the plaintiff is entitled to recover on prior peaceable possession alone.⁴¹² Possession is *prima facie* evidence of title.⁴¹³

§ 6369. **Prior claim to water.**—Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows.⁴¹⁴

§ 6370. **Prior possession of grantor.**—If one who has not been in actual possession of land claims title on the ground of prior possession, he must not only show the conveyances of his grantors,

⁴⁰⁷ Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103.

⁴⁰⁸ Potter v. Knowles, 5 Cal. 87.

⁴⁰⁹ Ayres v. Bensley, 32 Cal. 620.

⁴¹⁰ Buckner v. Chambliss, 30 Ga. 652.

⁴¹¹ Staininger v. Andrews, 4 Nev. 59.

⁴¹² Grady v. Early, 18 Cal. 108.

See, also, Donahue v. Gallavan, 43 Cal. 573.

⁴¹³ Hutchinson v. Perley, 4 Cal. 33, 60 Am. Dec. 578; Hicks v. Davis, 4 Cal. 67; Winans v. Christy, 4 Cal. 70, 60 Am. Dec. 597; Bequette v. California, 4 Cal. 278, 60 Am. Dec. 615.

⁴¹⁴ Kimball v. Gearhart, 12 Cal. 27.

but must show that they were in actual possession and occupation of the land.⁴¹⁵

§ 6371. **Title by prior possession.**—Actions of ejectment do not affect the title to the property, but the possession.⁴¹⁶ It is confined to cases where the claimant has a possessory title, or a right to entry upon the lands.⁴¹⁷ The right to possession, as between the parties, is tried, and this right to the possession is title.⁴¹⁸ An action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute, as against the defendant; but this refers to proceedings in equity.⁴¹⁹ In ejectment, plaintiffs may rely on prior possession, and the legal title is not necessarily involved.⁴²⁰ It is sufficient evidence of title to support the action.⁴²¹ Title, therefore, by prior possession may be alleged; but he must, in connection therewith, allege an entry and ouster,⁴²² and a continued adverse holding by the defendant.⁴²³

§ 6372. **Form of ejectment in Oregon.**—The rule of practice in Oregon specially directs the substance of the complaint in actions for the “recovery of the possession of real property.” The Oregon statute is as follows: “The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him, to his damage, such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had.”^{423a} But plaintiff should not set out his muniments of title.⁴²⁴ Where, however, defendant set up an undivided interest in himself he was required to specify what such interest was.⁴²⁵ It was necessary to

⁴¹⁵ Borel v. Rollins, 30 Cal. 408; Lawrence v. Fulton, 19 Cal. 683.

⁴¹⁶ Long v. Neville, 29 Cal. 131. But see Marshall v. Shafter, 32 Cal. 194.

⁴¹⁷ Payne v. Treadwell, 5 Cal. 310.

⁴¹⁸ Marshall v. Sharter, 32 Cal. 194.

⁴¹⁹ Ortman v. Dixon, 13 Cal. 33.

⁴²⁰ Grady v. Early, 18 Cal. 108.

⁴²¹ Nagle v. Macy, 9 Cal. 426.

⁴²² Norris v. Russell, 5 Cal. 249; Boles v. Cohen, 15 Cal. 150; Payne v. Treadwell, 16 Cal. 220.

⁴²³ Boles v. Cohen, 15 Cal. 150; Garrison v. Sampson, 15 Cal. 93.

^{423a} Gen. Laws 1872, § 315; B. & C. Codes, § 328.

⁴²⁴ Pease v. Hannah, 3 Or. 301.

⁴²⁵ Id. See, as to what the complaint should contain, Mitchell v. Campbell, 19 Or. 198, 24 Pac. 455.

allege in the complaint that the plaintiff is entitled to the possession of the property.⁴²⁶ An allegation that plaintiff is the owner of the land sought to be recovered sufficiently describes the nature of the plaintiff's estate to give the court jurisdiction and to sustain the action, in the absence of a demurrer or other attack upon the complaint before an answer to the merits.⁴²⁷ Proof by plaintiff of prior possession under deeds conveying a colorable title is sufficient as against a trespasser.⁴²⁸ The donee of a land claim may maintain an action under the statute for the recovery of real property; at least, against one who shows no title except possession.⁴²⁹ A deed unacknowledged and unrecorded is good between the parties.⁴³⁰ And a recorded conveyance of real estate, not vitiated by fraud, will have priority in all cases over a conveyance not recorded.⁴³¹ An executor has not such an estate as will authorize him to maintain an action under the Oregon statute.⁴³² It was held not to lie to enforce the right of a widow to remain in her husband's dwelling-house one year after his death.⁴³³

§ 6373. **Defenses—Essential denials.**—Unless the answer denies the allegations of the complaint, they are admitted without further proof, damages included.⁴³⁴ Thus, where the complaint charged that on a day mentioned the plaintiffs were lawfully seised and possessed, and had the right of possession, of a certain tract of land, and the defendants afterwards entered into and upon the said tract, and ousted plaintiffs therefrom, and the answer, in response to these allegations, averred that the defendant was not guilty of the supposed trespasses and ejectment in the complaint mentioned, nor of any part thereof, it was held that the answer raised no issue;⁴³⁵ and where the defendant further alleged that he was not in possession of the lands and tenements described in the complaint, or any part thereof, it was held that the allegation of the complaint must be taken as confessed.⁴³⁶ But a denial

⁴²⁶ Bingham v. Kern, 18 Or. 199, 23 Pac. 182.

⁴²⁷ Johnson v. Crookshanks, 21 Or. 339, 28 Pac. 78. See, also, Thompson v. Wolf, 6 Or. 308.

⁴²⁸ Oregon etc. Nav. Co. v. Hertzberg, 26 Or. 216, 37 Pac. 1019.

⁴²⁹ Keith v. Cheeney, 1 Or. 285. See, also, Dolph v. Barney, 5 Or. 191.

⁴³⁰ Moore v. Thomas, 1 Or. 201.

⁴³¹ Id.

⁴³² Humphreys v. Taylor, 5 Or. 260. See B. & C. Codes, § 326.

⁴³³ Aiken v. Aiken, 12 Or. 203, 6 Pac. 682. As to sufficiency of complaint in action of ejectment for dower, see Draper v. Draper, 11 Hun, 616; McKay v. Freeman, 6 Or. 449.

⁴³⁴ Patterson v. Ely, 19 Cal. 28; McLaughlin v. Kelly, 22 Cal. 221.

⁴³⁵ Schenk v. Evoy, 24 Cal. 113.

⁴³⁶ Id.

“that said plaintiff on said second day of January, 1899, or at any other time, was possessed or entitled to the possession of said land and premises,” is a sufficient denial of plaintiff’s possession or right of possession.⁴³⁷ In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put in issue the question of possession: “Defendant denies that he has unlawfully, wrongfully, and in violation of plaintiff’s rights, had possession,” etc. This denial might be true, and yet the defendant be in possession. The defendant was called on to answer not only the character of the possession, but the fact of possession.⁴³⁸ The averments of possession and ouster, in this case, were held to be insufficiently denied.⁴³⁹ A denial that the plaintiff has suffered damage in the exact sum claimed by him is insufficient.⁴⁴⁰ An allegation in a verified complaint that “defendants wrongfully and unlawfully entered upon and dispossessed” plaintiff is not sufficiently denied by a denial that defendants wrongfully and unlawfully entered and dispossessed plaintiff, because such denial admits entry and ouster.⁴⁴¹ Where, in an action of ejectment, the complaint did not directly aver a seisin or ownership of the premises by plaintiff, but alleged that the plaintiff, by location, survey, and certain other acts, acquired possession, and the answer denied these acts, except the survey, and denied that plaintiff acquired possession by location, “or in any other manner,” it was held that the allegation of prior possession was sufficiently denied by the answer.⁴⁴² If the entry and ouster are denied in the answer, the withholding of possession at the commencement of the action is not admitted by the pleading, although it is not specially denied.⁴⁴³

§ 6374. **Defense—New matter.**—When a complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by defendants by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or, confessing them, should state distinctly and positively new matter

437 *Weeks v. Link*, 137 Cal. 502, 70 Pac. 548.

438 *Burke v. Table Mountain Co.*, 12 Cal. 403.

439 See, as to statement of facts, *Smith v. Doe*, 15 Cal. 100.

440 *Huston v. Twin etc. Turnpike Road Co.*, 45 Cal. 550.

441 *Busenius v. Coffee*, 14 Cal. 91.

442 *La Rue v. Oppenheimer*, 20 Cal. 517.

443 *Hawkins v. Reichert*, 28 Cal. 534.

sufficient to avoid them.⁴⁴⁴ But allegations in the answer setting out various links in plaintiff's title and declaring them defective are surplusage, when following a direct denial of plaintiff's claim of title, and as such surplusage may be stricken out.⁴⁴⁵ The defendant is bound to bring forward all matter of a strictly defensive character, or be precluded from again litigating the same; but he is not bound to set up or litigate new matter constituting a cause of action in his favor.⁴⁴⁶ Defendant should be allowed to amend his answer to set up a compromise agreement made subsequent to the filing of the answer.⁴⁴⁷ A claim of title by prescription should be pleaded as new matter.^{447a}

An answer setting out certain defects in plaintiff's title, that the sales and deeds were void because based on an invalid assessment, does not constitute new matter which requires a reply.⁴⁴⁸

§ 6375. Defense — Cross-complaint. — Whenever defendant seeks affirmative relief against any party to the action, affecting the property to which the action relates, he may, in addition to his answer, file a cross-complaint.⁴⁴⁹ In such cross-complaint he may plead a judgment rendered between their predecessors in interest, involving the title and possession of the land in question.⁴⁵⁰ But such cross-complaint must be as to the land in controversy, or it will be subject to demurrer.⁴⁵¹

§ 6376. Defense—Mistake.—The fact that defendant, through ignorance of the location of the boundary line, built on plaintiff's land is no defense.⁴⁵²

§ 6377. Purchase by defendant in ejectment.—If a defendant in ejectment, who is in possession without claim or color of title, buys a fractional interest in the demanded premises *pendente lite*, this purchase thenceforth presumptively divests his possession of its hostile character.⁴⁵³

⁴⁴⁴ Ladd v. Stevenson, 1 Cal. 18.

⁴⁴⁵ Nelson v. O'Brien, 139 Cal. 628, 73 Pac. 469.

⁴⁴⁶ Ayres v. Bensley, 32 Cal. 620.

⁴⁴⁷ Tarpey v. Madsen, 26 Utah, 294, 73 Pac. 411.

^{447a} Allen v. McKay (Cal.), 70 Pac. 8.

⁴⁴⁸ Cuenin v. Halbouer, 32 Colo. 51, 74 Pac. 885.

⁴⁴⁹ Cal. Code Civ. Proc., § 442.

⁴⁵⁰ Martin v. Molera, 4 Cal. App. 298, 87 Pac. 1104.

⁴⁵¹ McFarland v. Matthai, 7 Cal. App. 599, 95 Pac. 179.

⁴⁵² Hamilton v. Murray, 29 Mont. 80, 74 Pac. 75.

⁴⁵³ Carpentier v. Small, 35 Cal. 346.

§ 6378. **Transfer pending suit.**—The defendant cannot prove on the trial of an action of ejectment, for the purpose of showing that plaintiff's right of possession had terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or supplemental answer. If the plaintiff conveyed the land demanded, pending ejectment, the court, by the consent of both the plaintiff and the vendee, could, under the provisions of the Practice Act, make an order continuing the action in the name of the original plaintiff. If the plaintiff in ejectment transferred the demanded premises pending the action, and the court ordered the action continued in the name of the original plaintiff, he could recover judgment for both the possession and the rents and profits.⁴⁵⁴ The sale or transfer by the plaintiff in ejectment of the demanded premises pending the action was a transfer of the cause of action, within the meaning of the sixteenth section of the Practice Act, and the action could be continued in the name of the original plaintiff.⁴⁵⁵

§ 6379. **Stare decisis.**—Where important rights of property have grown up under a decision of the supreme court, and many years have elapsed since the same was rendered, and its correctness has been tacitly admitted in other cases, the question will not be reopened. The action does not now abate by the death or disability of a party or by transfer of interest in the premises.⁴⁵⁶

§ 6380. **Tax-title.**—A tax-title must be specially set up.⁴⁵⁷ And if it accrue after action commenced, it must be pleaded in a supplemental answer.⁴⁵⁸ It is not enough to allege that the property was duly sold for the non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute had been made.⁴⁵⁹ In an action to bar the rights of a former owner of lands sold and deeded for a non-payment of taxes, an action which merely denies the validity of the taxes, or that anything was due thereon for taxes at the time of the sale,

⁴⁵⁴ Moss v. Shear, 30 Cal. 467.

⁴⁵⁵ Cal. Code Civ. Proc., § 385.

⁴⁵⁶ Vassault v. Austin, 36 Cal. 691.

⁴⁵⁷ Russell v. Mann, 22 Cal. 132.

⁴⁵⁸ McMin v. O'Connor, 27 Cal.

246; Moss v. Shear, 30 Cal. 468.

⁴⁵⁹ Carter v. Koezley, 9 Bosw. 583.

and denies the title of the plaintiff, is not sufficient. It should allege facts showing specifically the grounds relied on to avoid the tax-deed.⁴⁶⁰ Whenever a tax-title is specially set forth in a pleading, it is necessary that every fact should be averred which is requisite to show that each of the statutory provisions have been complied with. This necessity is not obviated by the provisions making the tax-deed proof of certain facts. In pleading a tax-title, it is necessary to aver those facts which by statute are required to be stated in the tax-deed. A pleading setting up a tax-title must aver distinctly for what year the tax was assessed, and failing to do so, is demurrable.⁴⁶¹

§ 6381. **Pleading—Title in defendant.**—Title in the defendant need not be pleaded, and may be given under a denial of plaintiff's title, and, if pleaded, such an allegation does not constitute new matter, and is only equivalent to a general denial of title in the plaintiff.⁴⁶² The defendant need not show that he has any title whatever, but may confine himself simply to rebutting the evidence of the plaintiff.⁴⁶³ An answer in an action of ejectment, where both parties claim under a common grantor, which sets up as a defense a legal title in defendant, and also a verbal contract made by plaintiff's grantor to convey, and an entry under and a subsequent purchase by plaintiff, with notice, contains both a legal and equitable defense.⁴⁶⁴ A plea which sets up no title in the defendant, but alleges certain evidence or sources of title which it avers the plaintiff relies on, and states facts to show such title is invalid, is bad.⁴⁶⁵ Where the defendant in ejectment set up title derived under a written instrument claiming to be a conveyance, but lacking all the requisites, such a defense was insufficient against a party holding a subsequent deed from the same grantor.⁴⁶⁶

A right of possession in a defendant in ejectment, as administrator of an estate, may be proved under denials in the answer, that the plaintiffs are the owners or entitled to the possession of the demanded premises.⁴⁶⁷ Under a general denial in ejectment,

⁴⁶⁰ Wakeley v. Nicholas, 16 Wis. 588.

⁴⁶¹ Russell v. Mann, 22 Cal. 131.

⁴⁶² Marshall v. Shafter, 32 Cal. 176.

⁴⁶³ Moore v. Tice, 22 Cal. 516.

⁴⁶⁴ Bodley v. Ferguson, 30 Cal. 511.

⁴⁶⁵ Christy v. Scott, 14 How. 282, 14 L. Ed. 422.

⁴⁶⁶ Hayes v. Bona, 7 Cal. 153.

⁴⁶⁷ Burgel v. Prisser, 89 Cal. 70, 26 Pac. 787.

in which the plaintiff claims title under a deed from the defendant, evidence is admissible to show that the consideration of the deed under which the plaintiff bases his title and right of entry was illegal, and that the deed was therefore void.⁴⁶⁸ In ejectment, where the answer denies the averments of the complaint with respect to the plaintiff's ownership and right of possession, further allegations therein with respect to the ownership of the grantors of the plaintiff are immaterial, and need not be denied.⁴⁶⁹ Under the Washington statute^{469a} requiring the defendant in ejectment to plead the estate or license whereby he holds possession, an answer of general denial will create no issue, and where the plaintiff, in such an action, pleads and proves any legal right to the premises, he thereby establishes a *prima facie* case against the defendant.⁴⁷⁰

§ 6382. **Title in third person.**—A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person.⁴⁷¹ The defendant may show that the title and right of possession are in some third person, except in the case of public lands, in which case this rule is qualified.⁴⁷² A subtenant's rights can be no greater than those of his landlord.⁴⁷³ A possession taken and held by the defendant for the requisite period in hostility to the title or claim set up by the plaintiff amounts to an adverse possession against the plaintiff sufficient to bar a recovery, even though the defendant while so in possession admitted the validity of a title outstanding in a third person.⁴⁷⁴

§ 6383. **Title to part.**—An answer in ejectment setting up title to only a portion of the demanded premises must particularly describe the part to which title is claimed.⁴⁷⁵ An answer in eject-

⁴⁶⁸ Sparrow v. Rhoades, 76 Cal. 208, 9 Am. St. Rep. 197, 18 Pac. 245.

⁴⁶⁹ Morgan v. Tillottson, 73 Cal. 520, 15 Pac. 88.

^{469a} Wash. Bal. Codes, § 5509.

⁴⁷⁰ Allen v. Higgins, 9 Wash. 446, 43 Am. St. Rep. 847, 37 Pac. 671.

⁴⁷¹ Gregory v. Haynes, 13 Cal. 591.

⁴⁷² Moore v. Tice, 22 Cal. 516.

See, also, Cobb v. Lavalle, 89 Ill. 331, 31 Am. Rep. 91.

⁴⁷³ Murray v. Briggs, 29 Wash. 245, 69 Pac. 765.

⁴⁷⁴ Page v. Fowler, 28 Cal. 611; Hayes v. Martin, 45 Cal. 559; Manus v. O'Sullivan, 48 Cal. 15.

⁴⁷⁵ Anderson v. Fisk, 36 Cal. 625.

See, also, Hemenway v. Francis, 20 Or. 455, 26 Pac. 301.

ment setting up title in the defendant to the demanded premises, and possession in him, should aver that such possession and title were adverse to the plaintiff's claim of title.⁴⁷⁶ If defendant is rightfully in possession under a lease and option to buy, ejectment will not lie.⁴⁷⁷ Defendant cannot attack plaintiff's title which is regular on its face without connecting himself with a paramount title, besides adverse possession.⁴⁷⁸

§ 6384. Title terminated.—Under the California Practice Act,⁴⁷⁹ if it appear that the plaintiff in ejectment had a right to recover at the commencement of the suit, but that his right has terminated during its pendency, he cannot recover the possession, but only his damages.⁴⁸⁰ If the termination of plaintiff's title pending the action would not necessarily appear from plaintiff's proofs on the trial, the facts showing such termination should be set up by a supplemental or amended answer.⁴⁸¹

§ 6385. Abandonment, when must be pleaded.—An abandonment takes place only when one in possession leaves with the intention of not again resuming possession. Abandonment is therefore a question of intention, and should be specially pleaded, and the facts stated on which the defendant relies.⁴⁸² In an action of ejectment, one of the material allegations of the complaint is that the plaintiff was the owner and entitled to the possession at the time of the alleged entry by defendant, and, under a direct denial of this averment, the defendant may show that previous to his entry a title which once existed in the plaintiff had been lost by abandonment or forfeiture.⁴⁸³ Where a right to recover is founded upon naked possession, the defendant, under the general issue, without pleading abandonment, may prove abandon-

⁴⁷⁶ *Anderson v. Fisk*, 36 Cal. 625.

⁴⁷⁷ *Tyson v. Neill*, 8 Idaho, 603, 70 Pac. 790.

⁴⁷⁸ *Phillips v. Carter*, 135 Cal. 604, 87 Am. St. Rep. 152, 67 Pac. 1031.

⁴⁷⁹ Cal. Code Civ. Proc., § 740.

⁴⁸⁰ *Moore v. Tice*, 22 Cal. 513; Cal. Code Civ. Proc., § 740, as amended 1907.

⁴⁸¹ See *McMinn v. O'Connor*, 27 Cal. 247; *Reily v. Lancaster*, 39 Cal.

356; *Thompson v. McKay*, 41 Cal. 231; *Foscalina v. Doyle*, 47 Cal. 437, 438.

⁴⁸² *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181; *St. John v. Kidd*, 26 Cal. 266; *Root v. Ball*, 4 McLean, 177, Fed. Cas. No. 12035. That it need not be specially pleaded where the strict legal title is not in question, see *Bell v. Brown*, 22 Cal. 671; *Willson v. Cleveland*, 30 Cal. 192.

⁴⁸³ *Bell v. Brown*, 22 Cal. 671.

ment by the plaintiff before the defendant's entry.⁴⁸⁴ Evidence of the abandonment of a mining claim by a party suing to recover the same is admissible without a special plea thereof, under a denial of title in the plaintiff, pleaded by the defendant.⁴⁸⁵ Mere lapse of time does not constitute an abandonment, but it may be given in evidence for the purpose of ascertaining the intention of the parties.⁴⁸⁶

§ 6386. **Abatement—Another action pending.**—In an action to recover land, an answer of another action pending for the same cause must show that the same title, the same injury, and the same subject-matter are in controversy in both actions. Answers in abatement of an action are to be strictly construed.⁴⁸⁷

§ 6387. **Abatement by death.**—The death of the wife without issue, after a suit by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit.⁴⁸⁸ No abatement takes place in ejectment, except in the case of a sole defendant,⁴⁸⁹ on the death of the plaintiff's lessor,⁴⁹⁰ or of the defendant.⁴⁹¹ In a real action, the death of either party before judgment abates the suit.⁴⁹²

§ 6388. **Abatement by transfer of property.**—In New York, the transfer of all the interest of a sole defendant abates the action. A new action may be maintained against the transferee.⁴⁹³ In California, if the fact appears on the record that after the institution of the suit the plaintiff conveyed a portion of the land in controversy to other persons, it would be no ground for reversing the judgment.⁴⁹⁴ The conveyance of the entire interest in the

484 Willson v. Cleaveland, 30 Cal. 192.

485 Bell v. Bed Rock T. & M. Co., 36 Cal. 214.

486 Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181.

487 Larco v. Clements, 36 Cal. 132.

488 Gee v. Moore, 14 Cal. 472.

489 Adams on Ejectment, 298; 2 Tidd, 846; Putnam v. Van Buren, 7 How. Pr. 31; James v. Bennett, 10 Wend. 540; Hatfield v. Bushnell, 1 Blatchf. 393, Fed. Cas. No. 6211.

490 Frier v. Jackson, 8 Johns. 495.

491 Diefendorf v. House, 9 How. Pr. 243; Spalding v. Congdon, 18 Wend. 543; Springsted v. Jayne, 4 Cow. 423; Blewett v. Tregonning, 4 Ad. & El. 1002.

492 Macker v. Thomas, 7 Wheat. 530, 5 L. Ed. 515; Green v. Watkins, 6 Wheat. 260, 5 L. Ed. 256; Dykeman v. Allen, 2 How. Pr. 17.

493 Mosely v. Albany N. R. R. Co., 14 How. Pr. 71; Mosely v. Mosely, 11 Abb. Pr. 105; Lowry v. Morrison, 11 Paige, 327.

494 Barstow v. Newman, 34 Cal. 90; Moss v. Shear, 30 Cal. 468.

land by the plaintiff will necessarily defeat the action.⁴⁹⁵ The court may, in ejectment, by consent of both plaintiff and vendee, make an order continuing in the name of the original plaintiff.⁴⁹⁶ Such a sale is a transfer of the cause of action;⁴⁹⁷ or such purchaser may intervene.⁴⁹⁸

§ 6389. **Mexican grant.**—If the plaintiff relies on a title derived from the Mexican government, and confirmed by the United States, without stating the time of confirmation, an answer which sets up as a defense the statute of limitations is good, without stating that the Mexican grant was finally confirmed more than five years next before the commencement of this action.⁴⁹⁹

§ 6390. **Mexican grant—Probate sale.**—If a Mexican grantee dies, and his heirs petition for and obtain to themselves a confirmation of the grant, and the patent issues to them, the legal title vests in the heirs and their grantees, and does not inure to the benefit of one who purchases at a probate sale made by the administrator of the grantee so as to vest in him the legal title, and the patentees will prevail in ejectment against the purchaser at such sale if the defendant does not set up a valid equitable defense. If it be conceded that the administrator's deed was valid and sufficient to convey the interest which the deceased held in the land, such deed will not entitle them at law to the benefits of the confirmation and patent.⁵⁰⁰

§ 6391. **Mexican grant—Limitation.**—The California statute of limitations of 1850, as to real actions, was general, and no exceptions were made in favor of Mexican grants.⁵⁰¹ In 1855, this section was amended by adding the following proviso: "Provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments or the authorities thereof, if such action be commenced within five years from the time of the final confirmation of such title by the government of the United States or its legally constituted authorities."⁵⁰² By the

495 *Barstow v. Newman*, 34 Cal. 90.

496 *Moss v. Shear*, 30 Cal. 463.

497 *Id.*

498 *Brooks v. Hagar*, 5 Cal. 281.

499 *Anderson v. Fisk*, 36 Cal. 632.

500 *Hartley v. Brown*, 51 Cal. 467.

501 Stats. 1850, p. 344, § 6.

502 Stats. 1855, p. 109, § 1.

amendment of 1863, this proviso was stricken out, and in section 6 of the amendatory act another proviso was adopted, giving to Spanish or Mexican claimants, or those claiming under them, whose claims had not been finally confirmed more than five years before the passage of the act, five years after its passage to commence actions or make defense, etc. A second proviso in the same section declared that "nothing in this act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate or the possession thereof, under title derived from Spanish or Mexican governments, in a case where final confirmation has already been had, other than is now allowed under the act to which this act is amendatory."⁵⁰³ The title declares this act to be amendatory of the act of 1850. "Final confirmation" was declared to be the issuance of the patent, or the final determination of the official survey, under the provisions of the act of Congress of June 14, 1860,⁵⁰⁴ regulating the jurisdiction of the district courts of the United States in regard to the survey and location of confirmed private land claims.⁵⁰⁵ Under this act, Mexican grantees whose grants were finally confirmed, within the meaning of the act, prior to April 18, 1858, were barred under the act of 1855; and grants thus confirmed between April 18, 1858, and April 18, 1863, were not barred until April 18, 1868.⁵⁰⁶ The provisos in the act of 1863 constitute exceptions to the otherwise general provisions of the act; and in California it has been uniformly held that a party claiming to be within the benefit of the exceptions must affirmatively establish his case in that respect, and this must be considered no longer an open question in the supreme court of that state. The party claiming title under a Mexican grant, if the other relies on five years' adverse possession, must show that the patent has not issued for the same, or that the official survey has not been approved by the United States district court, under the act of Congress of July 14, 1860.⁵⁰⁷ If the grantee of a Mexican grant conveys an undivided interest in the same, and, after the conveyance is made, holds possession of the whole of the grant adversely to all the world for the period required by the statute of limitations, the title which he has conveyed is extinguished.⁵⁰⁸

⁵⁰³ Stats. 1863, p. 327.

⁵⁰⁴ 12 U. S. Stats. at Large, pp. 33, 34.

⁵⁰⁵ 12 U. S. Stats. at Large, § 7.

⁵⁰⁶ *Morris v. De Celis*, 51 Cal. 60.

⁵⁰⁷ *Morris v. De Celis*, 51 Cal. 61.

⁵⁰⁸ *Hartman v. Reed*, 50 Cal. 485.

§ 6392. **Defense of statute of limitations.**—In Idaho, no action for the recovery of real property, or cause of action or defense arising out of the title to real property, can be maintained, unless it appears that the person prosecuting the action or making the defense, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises within five years before the commencement of the act in respect to which the action is prosecuted or defense made;⁵⁰⁹ or five years prior to commencement of the action itself;⁵¹⁰ or, in Washington, ten years.⁵¹¹ Where the defendant set up as a defense “that the title of the said plaintiff, if any he has to said premises, did not accrue within five years prior to the commencement of this suit, and that he has not been in possession thereof within five years prior to this suit,” it was held not to be a plea of the statute of limitations.⁵¹² An answer which avers that “if plaintiffs ever had any right or title to their claims, or to any portion thereof, they are barred by the statute of limitations, as they, the defendants, have been in quiet and peaceable possession of the same, adversely to these plaintiffs, for a period over five years,” is not a good plea of the statute of limitations.⁵¹³ The defense of five years’ adverse enjoyment of an easement must be pleaded in order that it may be available.⁵¹⁴ The defense of the statute of limitations must be specially pleaded in ejectment as in other actions, or the defense is waived.⁵¹⁵ Where the defense is the statute of limitations, the fact that the plaintiff, a married woman, claims title under an unrecorded deed will not exclude her from the saving clause of the statute.⁵¹⁶ Where an administrator fails to bring an action to recover real property within the five years required by the statute, an heir of the intestate is barred, though he was a minor, born after appointment of the said administrator.⁵¹⁷

⁵⁰⁹ Idaho Rev. Codes, §§ 4036, 4037; *Fountain v. Lewiston*, 11 Idaho, 451, 83 Pac. 505; *Ames v. Howes*, 13 Idaho, 756, 93 Pac. 35.

⁵¹⁰ Cal. Code Civ. Proc., § 318; *Daniels v. Dean*, 2 Cal. App. 421, 84 Pac. 332; *Union Ice Co. v. Doyle*, 6 Cal. App. 284, 92 Pac. 112.

⁵¹¹ Wash. Bal. Codes, § 4797; *Hyde v. Britton*, 41 Wash. 277, 83 Pac. 307.

⁵¹² *McKay v. Petaluma Lodge etc.*, Cal. Sup. Ct., April Term, 1866.

⁵¹³ *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387. See, also, *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

⁵¹⁴ *American Co. v. Bradford*, 27 Cal. 360.

⁵¹⁵ *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212.

⁵¹⁶ *Armijo v. Armijo*, 4 N. Mex. 133 (57), 13 Pac. 92.

⁵¹⁷ *Jenkins v. Jensen*, 24 Utah, 108, 91 Am. St. Rep. 783, 66 Pac. 773.

§ 6393. **Conjunctive denial.**—An averment in a complaint that the defendant, since November, 1858, “has continued to possess and occupy said land and premises, and use the same in her said sole-trader business,” is not denied by a denial in the answer that defendant has continued since the ninth day of November, 1858, to occupy or use the said premises in her business as such sole trader.⁵¹⁸

§ 6394. **Counter-averments.**—If the complaint contains averments of the facts constituting a deraignment of title in a certain manner, and the answer contains a counter-averment that the title was derived in a different manner, this counter-averment is a denial, if it is alleged that the facts are not otherwise than averred in the counter-statement.⁵¹⁹

§ 6395. **Disclaimers.**—An answer which disclaims all interest in the land in dispute, except such as the defendant may have under the homestead law, is not a disclaimer.⁵²⁰ Where defendants disclaim as to a part of the premises, and as to another part pleaded that plaintiff was not in possession at the time of the commencement of the action, it is not error to render judgment against them for costs. Where the plaintiff succeeds in part and fails in part, costs may be awarded, at least upon the part on which he succeeded; and defendants cannot take advantage of the statutory provision relating to disclaimers to save themselves from costs, where they have raised the issue on plaintiff’s possession.⁵²¹ One who held possession in subordination and in privity with the title of the rightful owner is not precluded from imparting by his own acts an adverse character to his possession; nor is it necessary to first surrender the premises. The trustee may disavow and disclaim his trust; the tenant, the title of his landlord after expiration of lease, or even before, by forfeiture of lease, disclaiming the tenure, and attorning to another.⁵²² So the vendee may disclaim the title of his vendor after breach of his contract, and the statute will commence to run at the time

518 *Camden v. Mullen*, 29 Cal. 564.

519 *Siter v. Jewett*, 33 Cal. 92.

520 *De Uprey v. De Uprey*, 27 Cal. 331, 87 Am. Dec. 81; *Noe v. Card*, 14 Cal. 576.

521 *Brooks v. Calderwood*, 34 Cal. 563.

522 *Blight’s Lessees v. Rochester*, 7 Wheat. 535, 5 L. Ed. 516; *Willison v. Watkins*, 3 Pet. 47, 7 L. Ed. 596; *Walden v. Bodley*, 14 Pet. 156, 10 L. Ed. 398; *Reed v. Proprietor of Locks and Canals*, 8 How. 274, 12 L. Ed. 1077.

of such disclaimer.⁵²³ But a clear, positive, and continued disclaimer is necessary.⁵²⁴

§ 6396. **Forfeiture, plea of.**—In an action of ejectment to recover mining claims, an answer to the complaint which avers that any right that plaintiffs may have ever had to the possession, etc., they forfeited by the non-compliance with the rules, customs, and regulations of the miners of the diggings, embracing the claims in dispute, prior to the defendant's entry, is insufficient in not setting forth the rules, customs, etc. The facts should be stated so as to enable the court to determine whether the forfeiture did accrue. The averment of forfeiture is a legal conclusion upon which no issue can be taken.⁵²⁵

§ 6397. **Former recovery.**—A plea of former recovery in ejectment as to a part of the demanded premises should describe the land which was in contest in the former action, and such plea is bad if it is pleaded as a general defense to the whole action, and there are several plaintiffs, and the former recovery was against one only of the several.⁵²⁶ In an action of ejectment to recover the possession of land, where the defendant simply denied the allegation of the complaint, it was held that he could not introduce in evidence a copy of the record of a former recovery.⁵²⁷

§ 6398. **Possession admitted.**—Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact not in issue by the pleadings, but affecting the whole case.⁵²⁸

§ 6399. **General issue.**—If the defendant in ejectment pleads the general issue only, the plaintiff is entitled to recover in case

523 *Pellatt v. Ferrars*, 2 Bos. & Pul. 542; *Fenwick v. Reed*, 5 Barn. & Ald. 232; *Fishar v. Prosser*, Cowp. 217; 2 *Starkie on Evidence*, 887; *Kane v. Bloodgood*, 7 Johns. Ch. 90, 11 Am. Dec. 417; *Salmon v. Rance*, 3 Serg. & R. 311; *Jordan v. Cooper*, 3 Serg. & R. 570; 2 Sch. & Lef. 633.

524 *Zeller's Lessees v. Eckert*, 4 How. 289, 11 L. Ed. 979.

525 *Dutch Flat Co. v. Mooney*, 12 Cal. 534.

526 *Anderson v. Fisk*, 36 Cal. 625.

527 *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692.

528 *Powell v. Oullahan*, 14 Cal. 114.

the defendant is found in possession of any part of the demanded premises.⁵²⁹ The general issue plea is not guilty, and under it coverture or any other available defense may be taken.⁵³⁰ In an action of ejectment, under the general issue, the question at issue is not whether the ancestor had title and the right of possession, but whether the plaintiffs at the commencement of the action had such title and right. Under the general issue, or a general denial of the allegations of the complaint, the defendant may controvert by evidence any and every fact which the plaintiff is bound to establish to make out his cause of action.⁵³¹ He cannot, under such an answer, prove a discharge of a cause of action once existing in the plaintiff against him, because that is an affirmative defense, or new matter, which must be pleaded. But he may show that the plaintiff never had any such cause of action against him as is alleged in the complaint.⁵³² Matter that goes to affect the title may be proved under the general denial.⁵³³ So abandonment of land may be proved.⁵³⁴ A general denial in an action of ejectment brings in issue the respective titles of plaintiff and defendant.⁵³⁵

§ 6400. **Grant of easement.**—Grant of easement or servitude must be specially pleaded.⁵³⁶ The lessee of an inner close has, by necessity, a right of way over an outer close which belongs to his lessor; but he cannot by user acquire an easement to deposit packages on a close which belongs to his lessor.⁵³⁷

§ 6401. **Homestead.**—The husband or the wife may set up the facts of homestead, as a defense to ejectment, based upon a sheriff's deed upon the premises, made in pursuance of an execution sale on a judgment at law against the husband, there having been no abandonment of the homestead.⁵³⁸ A defendant in possession may show that he has entered the land under the homestead law of the United States, and is not estopped by a sale and

⁵²⁹ Greer v. Mezes, 24 How. 268, 16 L. Ed. 661.

⁵³⁰ Black v. Tricker, 52 Pa. St. 436.

⁵³¹ Andrews v. Bond, 16 Barb. 633.

⁵³² Raynor v. Timerson, 46 Barb. 518.

⁵³³ McCormie v. Leggett, 8 Jones L. 425; Moore v. Tice, 22 Cal. 516.

⁵³⁴ Willson v. Cleaveland, 30 Cal. 192; Bell v. Brown, 22 Cal. 671.

⁵³⁵ Marshall v. Shafter, 32 Cal. 176.

⁵³⁶ American Co. v. Bradford, 27 Cal. 360.

⁵³⁷ Gayford v. Moffatt, L. R., 4 Ch. 133.

⁵³⁸ Williams v. Young, 17 Cal. 509.

delivery of possession to him by the plaintiff from showing that he now holds it under said laws.⁵³⁹ He does not thereby deny the title of the vendor, but he confesses and avoids it. He may show that the vendor's title has expired; for by the estoppel he is precluded from denying only what he has previously admitted, and by executing the contract, and entering under it, he admitted the existence, but not the continuance, of title in the vendor.⁵⁴⁰ And as the right to possession depends upon title, when the vendor's title expires his right to possession expires.

§ 6402. **Misjoinder.**—Where two are joined as plaintiffs in an action for the recovery of land, a denial in the answer that the plaintiffs were in possession of the land does not present the issue of a misjoinder of either of the plaintiffs.⁵⁴¹

§ 6403. **New matter.**—Subsequently acquired title in defendant must be specially set up.⁵⁴² Title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.⁵⁴³ So, also, a transfer of title by plaintiff must be by supplemental answer, or it cannot be given in evidence.⁵⁴⁴ The interest of a mortgagor in possession was sold on execution, and ejectment was brought against him by the purchaser. It was held that the mortgagor could defend his possession by taking a lease from the mortgagees, and setting it up by a plea *puis darrein continuance*.⁵⁴⁵

§ 6404. **Non-tenure.**—In Massachusetts, in most actions, non-tenure is a good plea either in bar or abatement, though in some states and in England it is good only in abatement.⁵⁴⁶ A mortgagor in possession cannot, in a suit against him by his mortgagee to recover possession of the mortgaged premises, plead special non-tenure.⁵⁴⁷

539 *Holden v. Andrews*, 38 Cal. 119.

540 *Jackson v. Rowland*, 6 Wend. 670, 22 Am. Dec. 557; *Despard v. Wallbridge*, 15 N. Y. 374; *Holden v. Andrews*, 38 Cal. 119.

541 *Gillam v. Sigman*, 29 Cal. 637.

542 *Moss v. Shear*, 30 Cal. 468.

543 *Id.*; *Hardy v. Johnson*, 1 Wall. 371, 17 L. Ed. 502.

544 *Moss v. Shear*, 30 Cal. 468.

545 *Simmons v. Brown*, 7 R. I. 427, 84 Am. Dec. 569.

546 *Fiedler v. Carpenter*, 2 Woodb.

& M. 211, Fed. Cas. No. 4759.

547 *Marsh v. Smith*, 18 N. H. 366.

§ 6405. **Several defenses.**—In an action to recover a mining claim, the complaint, duly verified, alleged title and possession in plaintiffs on a certain day. The answer, also verified, denied that plaintiffs ever had either title or possession, and afterwards averred that if plaintiffs ever had a title to the claim, they had abandoned and forfeited it before defendants' entry. At the trial, on motion of plaintiffs, the court ordered defendants to elect on which of the above defenses they would rely; and defendants, having, after excepting to the order, elected to rely upon their denial, were precluded from introducing proof of the abandonment and forfeiture. It was held that the action of the court was error; that defendants had the right to set up both defenses in their answer, and support both by proof.⁵⁴⁸ The defendant may deny the title of the plaintiff, and also plead the statute of limitations.⁵⁴⁹ If in ejectment there are several defenses set up in the answer, some of which are insufficiently pleaded, and the defendants have a general verdict, and the record does not disclose on which one of the defenses the verdict was rendered, the judgment will be reversed.⁵⁵⁰

§ 6406. **Improvements—Set-off.**—Where damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, the value of such improvements may be pleaded as a set-off to the damages for withholding the property.⁵⁵¹ But where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property.⁵⁵² A defendant in ejectment who has made permanent improvements on the land in controversy is not entitled to set off the value of those improvements against the damages claimed by the plaintiff, unless the improvements have been made by him, or those under whom he claims, while holding possession under color of title, adversely to the claims of plaintiff, and in good faith.⁵⁵³ Where one who entered as a naked trespasser places improvements on the land, and afterwards buys an undivided

⁵⁴⁸ Bell v. Brown, 22 Cal. 671.

⁵⁴⁹ Willson v. Cleaveland, 30 Cal. 192.

⁵⁵⁰ Anderson v. Fisk, 36 Cal. 625.

⁵⁵¹ Cal. Code Civ. Proc., § 741; Yount v. Howell, 14 Cal. 465; Ford v. Holton, 5 Cal. 319; Welch v. Sulli-

van, 8 Cal. 165; Barton v. Wickizer, 41 Wash. 293, 83 Pac. 312; Monk v. Duell, 41 Wash. 403, 83 Pac. 313.

⁵⁵² Ford v. Holton, 5 Cal. 319.

⁵⁵³ Love v. Shartzler, 31 Cal. 488; Carpentier v. Small, 35 Cal. 346. See Bay v. Pope, 18 Cal. 694.

interest, in an action against him to recover possession of the land, by a tenant in common, who owned prior to the wrongful entry, the defendant cannot set off the value of his improvements against the damages;⁵⁵⁴ but can where improvements were made after plaintiff's title accrued, or where the holding of the defendant is not adverse within that section;⁵⁵⁵ or where defendant entered under a bond for a deed from the plaintiff.⁵⁵⁶ Growing crops upon the premises are a part of, and go with, such premises under the writ of possession, unless otherwise provided in the judgment.⁵⁵⁷ Value of improvements must be specially claimed by defendant.⁵⁵⁸

A finding, as a conclusion of law, that defendant is entitled to the possession until paid for the improvements, which is neutralized by a finding that defendant's possession is unlawful, does not authorize a judgment for defendant.⁵⁵⁹

§ 6407. Improvements—Landlord and tenant.—In Missouri, a tenant who disclaims the title of his landlord cannot, if defeated, have improvements.⁵⁶⁰ The fact that the defendant has made permanent and valuable improvements, in good faith and under color of title, is no defense to the action; but if such fact is set up in answer in such language as to contain the essential facts to justify a set-off of the value of improvements against rents, it will be treated as a good answer for that purpose, although no offer is made of such set-off.⁵⁶¹ An agreement to pay for the improvements, if made, is no defense in ejectment.⁵⁶²

§ 6408. Joint and several tenancy—Oregon rule.—In a writ of right, brought under the statute of Kentucky, where the demandant describes the lands by metes and bounds, and counts against the tenants jointly, the tenants, by pleading in bar, admit their seisin, and lose the opportunity of pleading a several ten-

⁵⁵⁴ Carpentier v. Mitchell, 29 Cal. 330; Brown v. Grady, 16 Wyo. 151, 92 Pac. 622.

⁵⁵⁵ Bay v. Pope, 18 Cal. 694; Love v. Shartzer, 31 Cal. 487.

⁵⁵⁶ Kilburn v. Ritchie, 2 Cal. 145, 56 Am. Dec. 326.

⁵⁵⁷ Harrod v. Burke, 76 Kan. 909, 123 Am. St. Rep. 179, 92 Pac. 1128.

⁵⁵⁸ Carpentier v. Gardner, 29 Cal.

160; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94.

⁵⁵⁹ Moffitt v. Rosencrans, 136 Cal. 416, 69 Pac. 87.

⁵⁶⁰ McQueen v. Chouteau's Heirs, 20 Mo. 222, 64 Am. Dec. 178.

⁵⁶¹ Anderson v. Fisk, 36 Cal. 625.

⁵⁶² Norris v. Hoyt, 18 Cal. 219. See, as to improvements under a lease, Gett v. McManus, 47 Cal. 56.

ancy.⁵⁶³ By section 316 of the Oregon Civil Practice Act,^{563a} the defendant is prohibited from giving in evidence "any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer." By section 314, a defendant in actual possession may, for answer, plead that he is in possession, only as tenant of another, and thereupon the landlord, if he apply, may defend.

§ 6409. **Separate answer.**—Defendants may answer separately, or demand separate verdicts.⁵⁶⁴ Where there are several defendants, to entitle them to separate verdicts, they should set forth with specific description the parcels which they severally occupy or claim.⁵⁶⁵ If the defendant in ejectment desires to defend for only a portion of the premises, and to limit his liability for mesne profits in a corresponding proportion, he must frame his answer accordingly, and specify the portion of the premises for which it is intended to defend, and disclaim as to the balance.⁵⁶⁶ In an action to recover the possession of lands from several defendants, a defendant who does not set up in his answer that his occupation and possession were exclusive and in severalty, and that the other defendant was in the exclusive occupation and possession of the remaining portion, thereby waives the objection that the plaintiff could not maintain the action against him and the other defendant jointly; and the plaintiff is not bound to elect at the trial against which of the defendants he will proceed.⁵⁶⁷

§ 6410. **Doctrine of estoppel.**—The doctrine of estoppel, which may be said to be founded upon the adage that "the truth is not to be spoken at all times," is a harsh one, and is never to be applied except where to allow the truth to be told could consummate a wrong to the one party, or enable the other to secure an unfair advantage.⁵⁶⁸ A person who has acquired the possession of lands under a contract of purchase is precluded while he continues in possession from disputing the title of his vendor; but he is not estopped from showing that his vendor's title has ex-

⁵⁶³ *Liter v. Green*, 2 Wheat. 306, 4 L. Ed. 246.

^{563a} Or. B. & C. Codes, § 329.

⁵⁶⁴ *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597.

⁵⁶⁵ *Patterson v. Ely*, 19 Cal. 28; *McGarvey v. Little*, 15 Cal. 31.

⁵⁶⁶ *Guy v. Hanly*, 21 Cal. 397.

⁵⁶⁷ *Fosgate v. Herkimer Mfg. etc. Co.*, 12 N. Y. 580; *Dillaye v. Wilson*, 43 Barb. 261.

⁵⁶⁸ *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129.

pired. And if, instead of a third person, the defendant has acquired the plaintiff's title, he is entitled to occupy the position that would have been held by the third person had the title vested in him.⁵⁶⁹ It was the old rule that only specialty or record could be pleaded by way of estoppel.⁵⁷⁰ But later cases sanction the idea that estoppels *in pais* may also be thus pleaded.⁵⁷¹ Where an equitable estoppel *in pais* is not properly pleaded, but on the trial evidence is introduced without objection, in the same manner as if it had been properly pleaded, and a verdict is rendered upon the evidence without objection, the objection to the pleading will be deemed waived, and the case will be considered as though the estoppel had been properly pleaded.⁵⁷² An estoppel by deed or matter of record should be pleaded as such, where there is an opportunity to plead it. Where no opportunity to plead it occurs, it is conclusive as evidence.⁵⁷³ So far as a deed is intended to pass or extinguish a right, it is the exclusive evidence of the contract, and the party is concluded by its terms; but the deed is not conclusive evidence of the existence of facts acknowledged in the instrument, such as its date, acknowledgment of payment, consideration, etc.⁵⁷⁴ Where plaintiff had possession under a deed duly recorded, and the defendant entered with notice of and in subordination to plaintiff's title, he cannot be permitted to deny it in an action of ejectment.⁵⁷⁵ A judgment in an action of ejectment, in which the landlord of the defendant defends the action for and in the name of his tenant, and puts his own title in issue, is inadmissible in evidence by way of estoppel in an action of ejectment brought by the same plaintiff against such landlord.⁵⁷⁶ An estoppel by judgment, to be available as a bar, must be pleaded.⁵⁷⁷

§ 6411. Landlord and tenant.—A tenant is estopped to deny that his landlord has a legal reversion, though it appear from the instrument of demise that the landlord has only an equity

⁵⁶⁹ Holden v. Andrews, 38 Cal. 119.

⁵⁷⁰ Davis v. Tyler, 18 Johns. 490; Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am. Dec. 51.

⁵⁷¹ Gaylord v. Van Loan, 15 Wend. 308; People v. Bristol etc. Turnpike Co., 23 Wend. 222.

⁵⁷² Davis v. Davis, 26 Cal. 38, 85 Am. Dec. 157.

⁵⁷³ Flandreau v. Downey, 23 Cal. 354; Corkhill v. Landers, 44 Barb. 218.

⁵⁷⁴ Rhine v. Ellen, 36 Cal. 362.

⁵⁷⁵ Stephens v. Mansfield, 11 Cal. 363.

⁵⁷⁶ Russell v. Mallon, 38 Cal. 259; Valentine v. Mahoney, 37 Cal. 389.

⁵⁷⁷ Josephi v. Mady etc. Co., 13

of redemption.⁵⁷⁸ As between landlord and tenant, the estoppel is designed as a shield for the protection of the former, but not as a sword for the destruction of the latter.⁵⁷⁹ The bare possession by the tenant of the demised land at the time the lease is given is sufficient to take the case out of the operation of the general rule, and the tenant cannot before surrendering possession dispute the landlord's title.⁵⁸⁰ If A., being in possession of land, delivered the possession to B. upon his request, and upon his promise to return it, with or without rent, at a specified time, or at the will of A., B. cannot be allowed, while still retaining the possession, to dispute A.'s title; but it is otherwise if B. is in possession and takes a lease from A., since the latter parts with nothing, and the former has obtained nothing by the transaction.⁵⁸¹ A tenant of the defendant in ejectment, who acquired his lease before the commencement of the suit, is not estopped as to his term by the judgment in an action obtained against his lessor;⁵⁸² as the estoppel of a party with respect to the assertion of one title may not avail to prevent him from setting up another, differently derived.⁵⁸³

§ 6412. Estoppel, how and when must be pleaded.—Equitable estoppels and defenses can be entertained in actions at law, but they must be specially stated in the answer.⁵⁸⁴ If defendant has no opportunity to plead estoppel, he may exhibit the matter thereof in evidence.⁵⁸⁵ The court, and not the jury, must pass upon the equitable title set up in the answer, and it must be sufficiently pleaded to warrant the court in granting a decree which will estop the further prosecution of the action;⁵⁸⁶ and if the

Mont. 195, 33 Pac. 1. See *Smith v. Los Angeles etc. Immigration etc. Assoc.*, 78 Cal. 289, 12 Am. St. Rep. 53, 20 Pac. 677.

⁵⁷⁸ *Morton v. Woods*, L. R., 3 Q. B. 658.

⁵⁷⁹ *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129.

⁵⁸⁰ *Tewksbury v. Magraff*, 33 Cal. 237; affirmed, *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129.

⁵⁸¹ *Franklin v. Merida*, 35 Cal. 558, 95 Am. Dec. 129.

⁵⁸² *Satterlee v. Bliss*, 36 Cal. 489.

⁵⁸³ *Wheeler v. Ruckman*, 2 Abb. Pr. (N. S.) 186.

⁵⁸⁴ *Clarke v. Huber*, 25 Cal. 593; *Davis v. Davis*, 26 Cal. 39, 85 Am. Dec. 157. See, also, *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Gary v. York Min. Co.*, 9 Utah, 469, 35 Pac. 494.

⁵⁸⁵ *Philadelphia etc. R. R. Co. v. Howard*, 13 How. 308, 14 L. Ed. 157.

⁵⁸⁶ *Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Cal. 660; *Estrada v. Murphy*, 19 Cal. 248; *Meador v. Parsons*, 19 Cal. 294; *Carpentier v. City of Oakland*, 30 Cal. 439; *Blum v. Robertson*, 24 Cal. 127; *Downer v. Smith*, 24 Cal. 124; *Tarpey v. Madsen*, 26 Utah, 294, 73 Pac. 411.

court decides in favor of the equitable title, it may properly direct a verdict accordingly.⁵⁸⁷

§ 6413. **Purchase of adverse claim.**—One who is in possession of and claiming to own land does not admit title in another because he buys the other's claim of title solely to quiet his own title and avoid litigation. Such purchaser is not estopped by such purchase from denying the validity of the claim thus purchased.⁵⁸⁸

§ 6414. **Character of defense—When may be interposed.**—When an equitable answer is interposed to an action of ejectment, said answer, being a bill in equity, can be interposed only where the parties to the action are such as would be required to a bill in equity seeking the same relief.⁵⁸⁹ Under the code of practice, equitable defenses may be interposed to the action of ejectment, but the defendant in such cases becomes an actor with respect to the matter presented by him, and his answer must contain all the essential averments of a bill in equity, and the equity presented must be of such a character that it may be ripened by the decree of the court into a legal right to the premises, or such as will stop the plaintiff in the prosecution of the action.⁵⁹⁰ And he must inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet, and to do this he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity.⁵⁹¹ Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief.⁵⁹² An equitable title arising out of a contract for a sale of land is a defense to an action instituted to recover possession of the land, the subject of the contract.⁵⁹³ But plaintiff's contract to convey,

⁵⁸⁷ *Brummett v. Campbell*, 32 Wash. 358, 73 Pac. 403.

⁵⁸⁸ *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205.

⁵⁸⁹ *Lestrade v. Barth*, 19 Cal. 660.

⁵⁹⁰ *Estrada v. Murphy*, 19 Cal. 248; *Weber v. Marshall*, 19 Cal. 447; *Downer v. Smith*, 24 Cal. 124; *Blum v. Robertson*, 24 Cal. 146. See *Hyde v.*

Mangan, 88 Cal. 319, 26 Pac. 180; *Clyburn v. McLaughlin*, 106 Mo. 521, 27 Am. St. Rep. 369, 17 S. W. 692; *Spaur v. McBee*, 19 Or. 76, 23 Pac. 818.

⁵⁹¹ *Davis v. Davis*, 26 Cal. 38, 85 Am. Dec. 157.

⁵⁹² *Lorraine v. Long*, 6 Cal. 452.

⁵⁹³ *Tibeau v. Tibeau*, 19 Mo. 78, 59 Am. Dec. 329.

which defendant has failed to perform on his part, does not constitute an equitable defense.⁵⁹⁴

§ 6415. **Injunction.**—The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. The only effect of this mode of asserting the rights of the defendants, instead of filing a bill in equity, is to require the court to pass upon the questions raised by the answer in the first instance. If, upon hearing the evidence, the court should determine there was ground for relief, it would enjoin the further prosecution of the action with its decree for a specific performance; and on the other hand, if it should refuse the relief, it would call a jury to determine the issue upon the general denial.⁵⁹⁵

§ 6416. **Equitable defenses—Must be specially pleaded.**—Equitable defense is fully available under the code in this form of action.⁵⁹⁶ The equitable defense is first to be passed upon by the court; and until it is disposed of the assertion of the legal remedy is in effect stayed. Upon the determination of the court upon the relief prayed by the answer, the necessity of proceeding with the action at law will depend. When it does proceed, the legal title will control its result.⁵⁹⁷ A person having the equitable title to land, coupled with the right of possession, may set up such title as a defense in an action of ejectment brought against him by the holder of the legal title.⁵⁹⁸ But in ejectment the legal title will always prevail against an equitable one, if no equitable defense is pleaded.⁵⁹⁹ And it is irregular to submit to the jury all the legal and equitable defenses together.⁶⁰⁰ Where defendant,

⁵⁹⁴ Howard v. Hewitt, 139 Cal. 614, 73 Pac. 414.

⁵⁹⁵ Arguello v. Edinger, 10 Cal. 150.

⁵⁹⁶ Murray v. Walker, 31 N. Y. 399; Safford v. Hynds, 39 Barb. 625; Lee v. Parker, 43 Barb. 611; Corkhill v. Landers, 44 Barb. 218.

⁵⁹⁷ Estrada v. Murphy, 19 Cal. 248; Martin v. Zellerbach, 38 Cal. 300, 99 Am. Dec. 365. See, also, Swasey v. Adair, 88 Cal. 179, 25 Pac. 1119;

Arguello v. Bours, 67 Cal. 447, 8 Pac. 49; Steele v. Boley, 7 Utah, 64, 24 Pac. 755; Snussenbach v. First Nat. Bank, 5 Dak. 477, 41 N. W. 662; Brady v. Husby, 21 Nev. 453, 33 Pac. 801.

⁵⁹⁸ Meeker v. Dalton, 75 Cal. 154, 16 Pac. 764. See Spaur v. McBee, 19 Or. 76, 23 Pac. 818.

⁵⁹⁹ Dorn v. Baker, 96 Cal. 206, 31 Pac. 37.

⁶⁰⁰ Lestrade v. Barth, 19 Cal. 660.

by cross-complaint, sets up a contract of sale under which he went into possession, it is competent for the court finally to adjudge the rights of both parties under such contract.⁶⁰¹ In Colorado, the vendee in such case is deemed guilty of unlawful detainer.⁶⁰² To sustain ejectment where time is not of the essence of the contract, there must have been an abandonment of the contract.⁶⁰³

§ 6417. Adverse possession.—Adverse possession is of two kinds: 1. Where possession is taken without color of title, but with intent to claim the fee against all comers;⁶⁰⁴ 2. Where possession is taken under a claim of title founded on a written instrument or a judgment of a court of competent jurisdiction.⁶⁰⁵ It may be acquired to part of a tract, while the owner of the title is in possession of the other part of the same tract.⁶⁰⁶

§ 6418. Adverse possession of water.—The right to the use of a watercourse on the public lands may be held granted, abandoned, or lost by the same means as a right of the same character issuing out of lands to which a private title exists. And on adverse possession, for the time provided by statute of limitations, the law will presume a grant of the right to its use.⁶⁰⁷

§ 6419. Consecutive possession.—The possession of several persons in succession, claiming under the same title, is the same possession.⁶⁰⁸ So a vendee's possession may be joined with that of his vendor.⁶⁰⁹ But the possession of different intruders in succession cannot be added together to create a title in the last intruder, especially where there is no privity between them.⁶¹⁰ The decision that adverse possession is not transferable was never acknowledged as sound by any land lawyer or judge of Pennsyl-

⁶⁰¹ *Belger v. Sanchez*, 132 Cal. 614, 70 Pac. 738.

⁶⁰² *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278.

⁶⁰³ *Brixen v. Jorgensen*, 28 Utah, 290, 107 Am. St. Rep. 720, 78 Pac. 674.

⁶⁰⁴ Cal. Code Civ. Proc., § 321.

⁶⁰⁵ *Kimball v. Lohmas*, 31 Cal. 154. See *Shanahan v. Tomlinson*, 103 Cal. 89, 90, 36 Pac. 1009; *Armijo v. Armijo*, 4 N. Mex. 133 (57), 13 Pac. 92.

⁶⁰⁶ *Davis v. Perley*, 30 Cal. 630.

⁶⁰⁷ *Yankee Jim's Union Water Co.*

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v. Crary, 25 Cal. 504, 85 Am. Dec. 145. See *Humphreys v. McCall*, 9 Cal. 59, 70 Am. Dec. 621.

⁶⁰⁸ *Lea v. Polk County Copper Co.*, 21 How. 493, 16 L. Ed. 203.

⁶⁰⁹ *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. Ed. 624.

⁶¹⁰ *Potts v. Gilbert*, 3 Wash. C. C. 475, Fed. Cas. No. 11347; overruled in part, see *Overfield v. Christie*, 7 Serg. & R. 173; *Scheetz v. Fitzwater*, 5 Pa. St. 126. See *San Francisco v. Fulde*, 37 Cal. 353, 99 Am. Dec. 278; *San Jose v. Trimble*, 41 Cal. 536, 543.

vania.⁶¹¹ Where, to ejectment on a patent to plaintiffs for land from the United States, defendants pleaded possession in themselves, and the parties through whom they claim, for five years before the commencement of the action, in accordance with mining customs, on the 4th of March, 1860, but admitted the issuance of the patent on the 19th of February, 1856, it was held that the plea is of no avail, because the admission shows plaintiffs were seised of the premises within the five years.⁶¹² If the possession of two or more persons in succession, holding in privity with each other, under title or color of title, makes out the prescribed time, the bar is complete.⁶¹³ But where the grantee's deed either called for land different from that sued for or was void for uncertainty of description, it was held he did not connect himself, by means of such deed, with the possession of his grantor.⁶¹⁴

§ 6420. **Equitable title—Trust.**—The purchaser of an equitable title by bond or contract may, equally with the purchaser of the legal title by deed, set up his possession as adverse to the vendor, as the vendor without a deed is the trustee of the vendee for the conveyance of the title.⁶¹⁵ One acquiring title in his own name, in violation of agreement, holds it in trust, and a further averment of conspiracy with other co-defendants may be treated as immaterial, and the action dismissed as to them, without relieving the defendant grantee of the trust and liability to ejectment.⁶¹⁶ Possession under a purchase, without deed or payment of purchase money, cannot by lapse of time ripen into a title. Possession is in such case possession of the vendor, and the same as landlord and tenant.⁶¹⁷

§ 6421. **Essential allegations must be specially pleaded.**—Adverse possession, if set up as a defense, must be specially pleaded. But title out of the plaintiff may be shown under a general denial.⁶¹⁸ An answer denying that defendant is in possession, or

611 Moore v. Small, 9 Pa. St. 194.

612 Fremont v. Seals, 18 Cal. 433.

613 Horton v. Crawford, 10 Tex. 382; Christy v. Alford, 17 How. 601, 15 L. Ed. 256.

614 People v. Klumpke, 41 Cal. 264.

615 Boone v. Chiles, 10 Pet. 177, 9 L. Ed. 388.

616 Johnston v. Gerry, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503.

617 Stansbury v. Taggart, 3 McLean, 457, Fed. Cas. No. 13292.

618 Raynor v. Timerson, 46 Barb. 518; Page v. Fowler, 28 Cal. 611; McManus v. O'Sullivan, 48 Cal. 15. See Hill v. Bailey, 8 Mo. App. 85. That the defense should be specially pleaded, see Hansee v. Mead, 27 Hun, 162.

that he unlawfully withholds possession, does not raise the question of adverse possession, or authorize a recovery for defendant on that ground. If he seeks to prevail upon an adverse possession, or on the ground that the conveyance under which plaintiff claims was made pending an adverse possession, he should in his answer set up title in himself or out of the plaintiff.⁶¹⁹ Where a defendant pleads title by virtue of adverse possession of a mine, evidence which tends to prove that such possession has been under a claim of ownership, and in hostility to the true owner, is admissible.⁶²⁰ A defendant in ejectment who relies on the statute of limitations need not prove adverse possession for the five years next preceding the commencement of the action. His defense is complete if he shows a five years' continued adverse possession, although not the five years next preceding the commencement of the suit.⁶²¹ The fee acquired by a five years' possession continues till conveyed by the possessor, or till lost by another adverse possession of five years.

§ 6422. **Possession as tenants in common.**—A party relying upon an adverse possession for five years, of land owned by himself and the adverse party as tenants in common, must allege, by pleading facts from which it will affirmatively appear, that his possession was of an adverse and positive character;⁶²² otherwise, his possession of the land, though exclusive, will be deemed to be according to his right, and in support of the title in common.⁶²³

§ 6423. **Prescription.**—To constitute a foundation for adverse possession at the common law, the instrument under which the occupant entered must purport in its terms to transfer the title, and the occupant must have entered under it in good faith, and with intention to hold against all the world.⁶²⁴ No title to public lands, mineral or otherwise, will accrue to any person against the general government by prescription, adverse possession, or estoppel *in pais*.⁶²⁵ The statute of limitations begins to run against the patentee of public lands from the United States from the date

⁶¹⁹ Ford v. Sampson, 8 Abb. Pr. 332, 30 Barb. 183.

⁶²⁰ Jones v. Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642.

⁶²¹ Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181; Cannon v. Stockmon, 36 Cal. 538, 95 Am. Dec. 205.

⁶²² Cannon v. Stockmon, 36 Cal. 538, 95 Am. Dec. 205.

⁶²³ Lick v. Diaz, 30 Cal. 65. See Phelan v. Smith, 100 Cal. 158, 34 Pac. 667.

⁶²⁴ Nieto v. Carpenter, 21 Cal. 455.

⁶²⁵ Doran v. Central Pacific R. R.

of the issuance of the patent, and not from the date of final payment for the land.⁶²⁶ At common law, an adverse possession of fifty years, though with knowledge of a better title, constitutes a good defense against that title.⁶²⁷

§ 6424. **Statute, how construed.**—It is a universally accepted rule that statutes of limitations are to be strictly construed. General words in the statute must receive a general construction, and if there be no express exception the courts can make none. The clause in the statute of limitations which provides that civil actions shall be commenced within certain periods therein prescribed “after the cause of action shall have accrued,” does not imply, in addition, the existence of a person legally competent to enforce it by suit. The statute must run in all cases not therein expressly excepted from its operation.⁶²⁸ An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions.⁶²⁹

§ 6425. **Statute, how pleaded.**—There is no technical rule observed by the court of chancery as to the form of a plea of the statute of limitations. A plea which sets up an adverse possession of forty years, while the period required by the statute of the state to bar a recovery is twenty years, is good; nor is it necessary to make any express reference to the statute of the state.⁶³⁰ It must be pleaded at the proper time, with no day of grace thereafter.⁶³¹ If an action of ejectment is in the name of the plaintiff, who has sold pending the action, the defendant cannot plead the statute of limitations as against the vendee of the plaintiff.⁶³²

Co., 24 Cal. 245; *Jackson v. Porter*, 1 Paine, 457, Fed. Cas. No. 7143.

⁶²⁶ *Steele v. Boley*, 7 Utah, 64, 24 Pac. 755; overruling 6 Utah, 308, 22 Pac. 311.

⁶²⁷ *Alexander v. Pendleton*, 8 Cranch, 462, 3 L. Ed. 624; *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624; affirming 1 McLean, 266, Fed. Cas. No. 4591.

⁶²⁸ *Tynan v. Walker*, 35 Cal. 634, 95 Am. Dec. 152.

⁶²⁹ *City of Oakland v. Carpentier*, 13 Cal. 540.

⁶³⁰ *Harpending v. Reformed Dutch Church*, 16 Pet. 455, 10 L. Ed. 1029.

⁶³¹ *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348. To the same effect, see *Meeks v. Hahn*, 20 Cal. 620; *American Co. v. Bradford*, 27 Cal. 360.

⁶³² *Moss v. Shear*, 30 Cal. 468. As to what such a plea should state in ejectment, see *Sharp v. Daugney*, 33 Cal. 505; *Vassault v. Seitz*, 31 Cal. 225.

§ 6426. **Title by adverse possession.**—A person in the adverse possession of land for five years, claiming to own the same exclusive of any other right, thereby acquires a fee-simple title to the same; and if he is then ousted, even by the party having the paper title, he can recover possession at any time before his right of action is barred by five years' adverse possession. The party claiming title by virtue of five years' adverse possession may give in evidence his acts and declarations made or done at any time while in possession, for the purpose of showing the character in which he claimed.⁶³³ Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.⁶³⁴ The lapse of time limited by statute not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder.⁶³⁵

§ 6427. **Consolidation of actions.**—Two actions of ejectment for separate pieces of property brought in the same court by the plaintiff against the same defendant may be consolidated.⁶³⁶

§ 6428. **Affirmative defense.**—An affirmative defense that the deed relied on by the plaintiff was a mortgage is covered by a denial of the plaintiff's allegation of ownership. It is not an equitable defense, and therefore the plaintiff is not entitled to have it first disposed of.⁶³⁷

§ 6429. **Issue as to cotenancy.**—A deed from a widow granting all of her individual estate in a tract of land which was the community property of herself and her deceased husband is taken subject to the right of the widow to have the land set apart by the probate court as a homestead for herself and her minor child, and her grantee cannot take as a tenant in common in such manner as to defeat such right; but the right of such grantee, if not defeated, is at least suspended during the period of the occupancy

⁶³³ Cannon v. Stockmon, 36 Cal. 535, 95 Am. Dec. 205.

⁶³⁴ Cal. Civ. Code, § 1007. See, also, Thompson v. Felton, 54 Cal. 547.

⁶³⁵ Leffingwell v. Warren, 2 Black,

605, 17 L. Ed. 261; Arrington v. Liscom, 34 Cal. 381, 94 Am. Dec. 722; Grimm v. Curley, 43 Cal. 250.

⁶³⁶ Smith v. Smith, 80 Cal. 323, 21 Pac. 4, 22 Pac. 186, 549.

⁶³⁷ Id.

of the property as a homestead. In ejectment against such grantee by the widow and minor child, where the complaint avers title in the plaintiffs and ouster by the defendant, and the answer denies each and every material allegation of the complaint, and pleads the bar of the statute of limitations, such pleading contests the right of the defendant to possession as a tenant in common with the infant plaintiff.⁶³⁸

§ 6430. **Legal defense—Damages.**—In an action of ejectment, a cross-complaint to quiet title presents only a legal, and not an equitable, defense, and the verdict of the jury in such action as to the amount of the damages suffered by the plaintiff is not advisory, but conclusive, except as against the power of the court to grant a new trial.⁶³⁹

§ 6431. **Judgment.**—A judgment on the merits is conclusive as to the ownership of the property upon the parties and their privies. The premises should be so described that the records will furnish evidence of the limits, as well as to point out to the sheriff serving the writ of possession the extent and location of the land, and with especial care where the dispute arises over a division boundary line.⁶⁴⁰ Judgment may give recovery for a part only of the land claimed, if the pleadings and proof show plaintiff entitled to only that part.⁶⁴¹

§ 6432. **Execution—Writ of possession.**—Service of a writ of ouster in an ejectment suit will not be enjoined where petitioners, the defendants in the ejectment suit, claim under void condemnation proceedings.⁶⁴² If plaintiff thinks defendant has re-entered upon part of the land after judgment, he may petition for the issuance of an *alias* writ of possession in ejectment, at the hearing of which evidence of a survey made subsequent to the judgment may be introduced.⁶⁴³ The writ may issue before entry of the judgment in the docket, but not before rendition of judgment.⁶⁴⁴

⁶³⁸ Phelan v. Smith, 100 Cal. 158, 34 Pac. 667.

⁶³⁹ Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637.

⁶⁴⁰ Porter v. Counts, 6 Cal. App. 550, 92 Pac. 655.

⁶⁴¹ Edwards v. Brusha, 18 Okla. 234, 90 Pac. 727.

⁶⁴² Board of Education v. Aldredge, 13 Okla. 205, 73 Pac. 1104.

⁶⁴³ Dutra v. Pereira, 135 Cal. 320, 67 Pac. 281.

⁶⁴⁴ Baum v. Roper, 1 Cal. App. 435, 82 Pac. 390.

FORMS IN EJECTMENT.

§ 6433. Complaint—Alleging title in fee simple.

Form No. 1732.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., he was seised in fee and possessed and entitled to the possession of that certain tract of land situated in the county of . . . , state of . . . , described as follows: [Description of property.]

II. That while the plaintiff was so seised, the defendant afterwards, on the . . . day of . . . , 19.., and without right or title, entered into possession of the demanded premises, and ousted and ejected plaintiff therefrom, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of . . . dollars.

III. That the value of the rents, issues, and profits of said premises from the said . . . day of . . . , 19.., and while the plaintiff had been excluded therefrom by the defendant, is . . . dollars.

Wherefore, the plaintiff prays judgment against the defendant:

1. For the recovery of the possession of the demanded premises, and for the sum of . . . dollars, damages for withholding the possession thereof.

2. For the sum of . . . dollars, the value of the said rents, issues, and profits, and costs of suit.

§ 6434. Complaint—Where damages and rents and profits are claimed.

Form No. 1733.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the plaintiff was the owner, and seised in fee and possessed, and entitled to the possession of that certain tract of land situate in the . . . county of . . . , state of . . . , described as follows, to-wit: [Description of property.]

II. That while the plaintiff was such owner, and so seised and possessed, and entitled to the possession of said land and premises, the said defendant did, on the day and year aforesaid, without

right or title, enter into and upon the same, and oust and eject the plaintiff therefrom, and ever since that day has withheld, and still withholds, the possession thereof from the plaintiff, to his damage in the sum of . . . dollars.

III. That the value of the rents and profits of the said land and premises, from the said . . . day of . . . , 19.., and while the plaintiff has been excluded therefrom, is . . . dollars.

Wherefore the plaintiff demands judgment against the said defendant:

1. For the restitution of said land and premises.
2. For the sum of . . . dollars damages for the withholding thereof.
3. For . . . dollars, the value of the rents and profits thereof, together with . . . dollars costs of suit.

§ 6435. Complaint—Alleging title by descent.

Form No. 1734.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B., late of . . . , deceased, was at and before his death seised in fee of [describe premises], and was at the time of his death in possession of the same.

II. That on the . . . day of . . . , 19.., at . . . , said A. B. died intestate, leaving surviving him the plaintiff, his sole heir at law.

III. That on the . . . day of . . . , 19.., [etc.], the defendant, who was not then and there, or at any time, the executor or administrator of the said A. B., did [allege ouster as in other forms].

[DEMAND OF JUDGMENT.]

§ 6436. Allegations setting forth title by devise.

Form No. 1735.

That on the . . . day of . . . , 19.., the said A. B. died, having by his last will devised to the plaintiff the said premises, which has been duly proved as a will of real estate in the probate court in the county of

§ 6437. Complaint—Alleging title by possession.

Form No. 1736.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., he was possessed of the [designate property].

II. That while so possessed, the defendant, on the . . . day of . . . , 19.., without right or title so to do, entered thereon, and ousted and ejected the plaintiff therefrom, and from thence hitherto has withheld, and still withholds, the possession thereof from the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6438. Complaint—Alleging prior possession.

Form No. 1737.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., he was lawfully possessed, as owner in fee simple, of that certain tract of land, situate in the county of . . . , state of . . . , described as follows: [Describe property.]

II. That the plaintiff being so possessed, the defendant afterwards, on the . . . day of . . . , 19.., entered into the possession of the demanded premises, and ousted the plaintiff, and now unlawfully withholds the possession thereof from the plaintiff, to his damage in the sum of . . . dollars.

III. That the value of the rents, issues, and profits of the said premises, from the said . . . day of . . . , 19.., and while the plaintiff has been excluded therefrom by the defendant, is . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6439. Complaint by tenant.

Form No. 1738.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. is the owner in fee simple of a piece of land in the township of . . . , county of . . . , bounded as follows: [Describe the land.]

II. That on the . . . day of . . . , 19.., the said A. B. let the said premises to plaintiff, for . . . years from . . .

III. That the defendant withholds the possession thereof from the plaintiff.

[DEMAND OF JUDGMENT.]

§ 6440. Complaint—Form under the Oregon code.

Form No. 1739.

[TITLE.]

The plaintiff complains, and alleges:

I. That he is [and for five years last past has continually been] the owner in fee of the parcel of land situated in said county, known and described as lot . . . , in block . . . , in the city of . . . , in said county and state, and is entitled to the possession thereof.

II. That the said defendant wrongfully withholds [and for one year and three months last past has continued wrongfully to withhold] the same from him, said plaintiff, to the said plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6441. Complaint—Form under New York code—By widow, for dower.

Form No. 1740.

[TITLE.]

The plaintiff complains, and alleges:

I. That the late A. B. was husband of the plaintiff at the time of his death; that he died many years since; and that at the time of his death, and for many years previous thereto, he was seised in fee and in possession of the following-described premises: [Description.]

II. That the plaintiff is entitled to one undivided third part thereof for her life, as her reasonable dower.

III. That the defendant Y. Z. is in possession of said premises, and wrongfully and unjustly withholds from plaintiff the possession of her one-third part thereof as her dower.

IV. That the other defendants claim an estate in fee in said premises, as the heirs at law of the said A. B.; that they are the legitimate children of said A. B.

Wherefore, the plaintiff demands judgment:

1. That she recover possession of one undivided third part of said premises for her own life, against said defendant Y. Z.

2. That she be declared entitled to one undivided third part thereof for her own life against all the other defendants.

3. That she recover her costs of action.

§ 6442. Answer containing special denials.

Form No. 1741.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That the plaintiff is the owner of the [lots of land] described in the complaint, or any part thereof, or was ever seised or possessed of the same, or any part thereof, or entitled to the possession thereof at any time or at all.

II. That the said plaintiff has any estate therein, or ever had.

III. That the said plaintiff has been damaged by said defendant's withholding the said premises, or the possession thereof, in the sum of . . . dollars, or in any other sum, or at all.

IV. That the annual value of the rents and profits of the premises described in the complaint is the sum of . . . dollars, or any other or greater sum than . . . dollars.

§ 6443. Denial of title.

Form No. 1742.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff, at the commencement of this action, was not the owner of the premises alleged [nor entitled to possession thereof].

§ 6444. Answer containing several defenses.

Form No. 1743.

[TITLE.]

The defendant answers to the complaint:

First. For a first defense:

I. That the grant of A. B. to the plaintiff, referred to in the complaint, was delivered at a time when the land mentioned therein was in the actual possession of the defendant, claiming under a title adverse to that of said A. B.

Second. For a second defense:

I. That on the . . . day of . . . , 19.., the said A. B. executed to the defendant a deed, whereby he granted to him a piece of land [describe as in deed].

II. That by a mutual mistake of the parties thereto, the said deed did not include the land mentioned in the complaint; but it

was their intention that it should, and they at the time of its execution believed that it did, include the same, and the defendant, in such belief, paid to the said A. B. the price thereof.

III. That this action is brought by the plaintiff to recover lands omitted from said deed by said mistake.

Wherefore, defendant demands that the plaintiff be adjudged to execute to the defendant a deed of conveyance correcting said mistake, and conveying to the defendant said premises in said agreement; and that the plaintiff be perpetually enjoined from the prosecution of this action.

§ 6445. Answer, with counterclaim for improvements.

Form No. 1744.

[TITLE.]

I. [Denial.]

II. [Affirmative defense, if any.]

By way of counterclaim herein, the defendant alleges:

III. That he has been in possession of the premises described in the complaint since the . . . day of . . . , 19.., holding adversely to said plaintiff, by title founded upon a written instrument, to-wit: [Here describe the deed or instrument fully according to its legal effect.]

IV. That under the said deed the defendant entered into exclusive possession of said premises, adversely asserting title thereto in good faith, founded upon said deed, and in the full belief that the said deed conveyed to him a good title, and still continues so to hold and possess said premises, claiming title thereto in good faith under said deed, and not otherwise. .

V. That the defendant, while so in possession of said premises, holding adversely and asserting title in good faith, founded upon said deed, has made permanent and valuable improvements thereon, to-wit: [Here state particularly improvements made.] Said improvements are of the value of . . . dollars.

VI. That during the time last aforesaid the defendant has paid the taxes assessed in said premises for the years 19.. and 19.., and that the amounts so paid and the dates of payment are as follows: [State amounts and dates.]

Wherefore, defendant demands judgment, that the complaint herein be dismissed with costs, or that, if plaintiff be adjudged entitled to recover possession of said premises, the defendant's

said claim for improvements and taxes be tried, and that he recover the same, as provided by law; and for such other judgment as may be just and equitable.

§ 6446. Allegation of adverse possession, avoiding deed.

Form No. 1745.

I. That at the time of the delivery of the deed alleged in the complaint [or, the deed under which the plaintiff claims], the lands therein described were in the actual possession of one M. N., claiming under a title adverse to that of the grantor in said deed.

§ 6447. Answer—That land which plaintiff seeks to recover was sold by him to defendant, and by mistake not conveyed in deed.

Form No. 1746.

[TITLE.]

The defendant answers to the complaint:

I. [Specific denial.]

Second. And by way of counterclaim the defendant alleges:

II. That on the . . . day of . . . , 19.., the plaintiff sold to defendant, and agreed to convey to him, the following described premises: [Description of premises actually sold, including the premises demanded.]

III. That the defendant fully performed all the conditions thereof on his part, and the plaintiff executed and delivered to him a deed as and for a conveyance thereof, but which, by mistake in drawing the same, which mistake was then unknown to the parties to said deed, conveyed only the following described premises: [Description.]

IV. That the defendant, supposing and believing said deed to be pursuant to the contract, and without negligence on his part, accepted it and took possession of the premises which he had agreed for, and still retains possession thereof.

V. That the premises mentioned in the complaint are a part of the premises designated in the contract, and the same which by said mistake was omitted to be included in said deed.

VI. That immediately upon discovering said mistake, to-wit, on or about the . . . day of . . . , 19.., the defendant applied to the plaintiff to correct the same by conveying said omitted part, which he refused to do.

Wherefore, the defendant asks judgment that the said deed be reformed by correcting said mistake in the boundaries, so that said deed shall express the true intent and meaning of the parties, and shall constitute a good and valid conveyance of the entire premises covered by said contract; that the said defendant be adjudged the true owner of the said premises described in plaintiff's complaint; and that the title thereof be passed to and vested in this defendant; and for such other and further relief as may be just and equitable, and for the costs and disbursements of this action.

§ 6448. Lis pendens in ejectment.

Form No. 1747.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the . . . county of . . . , state of California, by the above-named plaintiff against the above-named defendant, to recover certain real estate and the possession, with damages for the withholding thereof; and that the premises affected by this suit, and described in said complaint, are situated in the said . . . county of . . . , state of California, and are bounded and described as follows, to-wit: [Description.]

§ 6449. Judgment for plaintiff in ejectment, setting off value of improvements and taxes paid.

Form No. 1748.

[TITLE.]

The issues in this action, having been tried before the court and a jury, and the jury having returned their verdict, wherein they find for the plaintiff, that he is the owner in fee, and entitled to the possession of the premises described in the complaint [or, if part is recovered, describe the part], and having assessed his damages for the withholding at the sum of . . . dollars;

And the said defendant's counterclaim for improvements made and taxes paid upon the said premises having been tried by the same jury, and the jury having rendered their separate verdict that the defendant is entitled to recover for the value of such improvements the sum of . . . dollars, and for the taxes paid by him, with interest thereon, from the time of such payment, making together the sum of . . . dollars:

Now, on motion of G. H., attorney for plaintiff,—

It is adjudged:

1. That the plaintiff is the owner in fee simple [or otherwise, according to the fact], and entitled to the possession of the premises described in the complaint [or, if part be recovered, describe the part], and that he have and recover the possession thereof.

2. That the amount found as aforesaid for improvements and taxes paid, to-wit, the sum of . . . dollars, be set off against the amount of costs and damages, which costs and damages amount to the sum of . . . dollars, leaving a balance due the defendant of the sum of . . . dollars, and that the plaintiff pay the said balance so due the defendant, with interest, from the date of said [first mentioned] verdict, as a condition of execution; and that the plaintiff have no claim for rents and profits, while said balance and interest remain unpaid.

And it is further adjudged, that in default of such payment within said . . . years from the date of such assessment, to-wit, the . . . day of . . . , 19.., the plaintiff shall be deemed to have abandoned his claim of title to the premises above described, and, together with all persons claiming under him, shall be forever barred of a recovery thereof, and of claim of title thereto; and the title to said premises shall be deemed absolutely vested in the defendant, and the defendant in such event shall recover the costs of the separate trial of the value of such improvements, taxed at . . . dollars.

And it is further adjudged, that upon payment to the defendant of said sum of . . . dollars, and interest from the date of said verdict, pursuant to law, the plaintiff have execution for the premises recovered by him and hereinbefore described.

[DATE.]

§ 6450. Order setting off sums paid by defendant for taxes against damages, and requiring plaintiff to pay excess as condition of judgment.

Form No. 1749.

[TITLE.]

The above-entitled action having been tried before the court and a jury, and the jury having duly rendered their verdict, wherein they find that the plaintiff is the owner in fee simple [or describe the estate according to the fact] of the premises described in the complaint [or, of that portion of the premises described

in the complaint particularly described as follows: insert description of part recovered], and entitled to the possession thereof, and that the defendant unlawfully withholds possession thereof from him; and having assessed the plaintiff's damages for such unlawful withholding, at the sum of . . . dollars;

And it appearing to the court that the defendant claims title to the said premises in this action under a certain tax-deed thereof issued by [name county and state], on the . . . day of . . . , 19.., and that the plaintiff has recovered in this action by reason of defects or insufficiency of said deed;

And it further appearing that the amount for which said land was sold at said tax-sale, with the costs of executing and recording the said deed, is the sum of . . . dollars, and that the defendant has paid taxes on said lands subsequent to said tax-sale as follows: [Give dates and amounts.]

It is ordered, that the said sums, with interest on the same at the rate of . . . per cent per annum from the respective dates of payment thereof up to the date of the verdict herein, aggregating in all the sum of . . . dollars, be and are hereby set off against said damages, and it appearing that the excess due the defendant after making such set-off is the sum of . . . dollars:

It is further ordered, that as a condition of judgment in his favor the plaintiff, within . . . days from the date of this order, pay to the defendant the said sum of . . . dollars [excess aforesaid], with interest from the date of the said verdict to the time of such payment, and that in default of such payment the defendant shall have judgment in this action.

Upon compliance by the plaintiff with the terms of this order, let judgment be entered in his favor for the recovery of the possession of said premises.

[DATE.]

§ 6451. Judgment where plaintiff's title expired before trial.

Form No. 1750.

[TITLE.]

This action having been tried before the court and a jury, and the jury having returned their verdict that the plaintiff, at the time of the commencement of this action, was the owner of a life estate [or other estate, according to the fact] in the said premises, and entitled to the possession thereof, and that said estate

terminated on the . . . day of . . . , 19.., during the pendency of this action, and that the defendant unlawfully withheld possession of said premises from the plaintiff during said time, and the plaintiff's damages for such unlawful withholding having been assessed at . . . dollars:

Now, on motion of G. H., plaintiff's attorney,—

It is adjudged, that the plaintiff recover of the defendant . . . dollars damages for the withholding of the premises described in the complaint prior to the . . . day of . . . , 19.., when the plaintiff's title expired.

And as to possession of said premises: It is adjudged, that the defendant be not molested therein by plaintiff, his successors or assigns. The premises affected by this judgment are described as follows, to-wit: [Description.]

[DATE.]

§ 6452. Writ of possession.

Form No. 1751.

[TITLE.]

The People of the State of California to the Sheriff of the County of . . . , greeting:

Whereas, on the . . . day of . . . , 19.., A. B., as plaintiff, recovered a judgment and decree in the said superior court of the county of . . . , state of California, against C. D., as defendant, for the possession of certain premises in said judgment and decree, and hereinafter more particularly described, and also for the sum of . . . dollars damages for the detention of said premises, besides the sum of . . . dollars costs of suit, as appears to us of record;

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in said county of . . . , and the said judgment was docketed in said clerk's office, in said county on the day and year first above written:

Now, therefore, you, the said sheriff, are hereby commanded and required to deliver to the said plaintiff, A. B., the possession of the lands and premises in said judgment and decree described, as follows, to-wit: [Description.]

And whereas, the sums of . . . dollars damages, and . . . dollars costs, are now [date of this writ] actually due on said judgment:

You, the said sheriff, are hereby further required to make the said sums due on the said judgment, for damages and costs, and all accruing costs, to satisfy the said judgment, out of the personal property of said judgment debtor; or if sufficient personal property of said debtor cannot be found, then out of the real property in your county, belonging to him on the day whereon said judgment was docketed, in the said county, or at any time thereafter; and make return of this writ within [thirty] days after your receipt thereof, with what you have done indorsed thereon.

[DATE.]

CHAPTER CXLVII.

FOR FORCIBLE ENTRY AND UNLAWFUL DETAINER.

§ 6453. **Action—Character of.**—This action is a summary proceeding to recover possession of premises forcibly or unlawfully detained. It is a proceeding at law, and does not involve the exercise of equity jurisdiction. It is the appropriate remedy to recover from a settler without color of title lands to which plaintiff has the right of possession.¹ If the right of possession depends upon paramount title, legal or equitable, forcible entry and detainer does not lie.² The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. Question of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple, title, and present right of possession are shown to be in the defendant.³ In this action two questions are presented, viz.: Was the plaintiff at the time of the entry by the defendant exercising such acts of dominion over the property as constitute actual possession in law? and did the defendant forcibly deprive the plaintiff of this possession?⁴ At common law, a person holding the title to land, and having a present right of entry, might use actual force in entering, if necessary, for overcoming any forcible resistance, because, his right of entry being perfect, no other person could lawfully resist him in the exercise of his perfect right. The English statutes of forcible entry and detainer declared that an entry with actual force should subject the party so entering to an indictment for any consequential breach of the peace, and to restitution of possession, and also to an action of trespass. But

¹ Cope v. Braden, 11 Okla. 291, 67 Pac. 475; Anderson v. Ferguson, 12 Okla. 307, 71 Pac. 225.

² Jones v. Seawall, 13 Okla. 711, 76 Pac. 154.

³ McCauley v. Weller, 12 Cal. 500; Romero v. Gonzales, 3 N. Mex. 35 (5), 1 Pac. 171; Voll v. Hollis, 60 Cal.

569; Commissioners v. Barnard, 98 Cal. 199, 32 Pac. 982; Felton v. Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Holland v. Green, 62 Cal. 67; Nierosi v. Phillipi, 91 Ala. 299, 8 South. 561.

⁴ Potts v. Magnes, 17 Colo. 364, 30 Pac. 58.

these statutes have always been so construed as not to affect the common-law right of justifying in an action of trespass *quare clausum fregit* the forcible entry, by pleading and proving a right of entry, and hence *liberum tenementum* has, notwithstanding those statutes, been always held to be an effectual plea to the action of trespass, and thus proves that the right of entry is the right to make an actual entry on the land.⁵

The statutes against forcible entry and detainer are not aimed against the right of entry, nor even against the entry where the right to enter exists, but against an entry, irrespective of the right, under circumstances specially named or described in the statute. One erroneously put into possession of premises by a school board is rightfully there so long as his deposit money is retained, or his rights have not been adjudicated, even though notified to quit the premises.⁶ The right of entry could not be taken away by the statute, though it is entirely competent for the legislature, in the interest of peace and good order, to prohibit its exercise in such manner as would involve a breach of the peace or the wrongful injury or destruction of property. The injury to the public through an improper exercise of this important right may directly affect but one person, yet it is a wrong to the public, just as a crime committed against the person of A. is yet an offense against the commonwealth. Upon no other theory can any valid statute be framed which shall take away from one a right, or hinder its exercise, any more than he can be deprived of his property by the mere force of legislative enactment. The other branch of the statute, that in relation to unlawful detainer, is merely a summary mode of recovering possession by action from a tenant of real property. It will be observed that under the California statute there is no such thing as an "unlawful entry" except as constituting, under certain circumstances, a "forcible detainer." This action is not intended as a substitute for the action of ejectment.⁷ The purpose of the action is to obtain a restitution of the premises and damages occasioned by the forcible entry and detainer; but when damages are claimed which do not necessarily result from the forcible entry or detainer, the title to the property

⁵ Chief Justice Robertson, in *Tribble v. Frame*, 7 J. J. Marsh. 601, 23 Am. Dec. 439.

⁶ *Jones v. Seawall*, 13 Okla. 711, 76 Pac. 154.

⁷ *Hodgkins v. Jordan*, 29 Cal. 577; *Owen v. Doty*, 27 Cal. 502; *Brandenburg v. Reithman*, 7 Colo. 323, 3 Pac. 577.

injured may be a proper subject of inquiry, as in other actions for the same injury.⁸ Such action does not lie to enforce an incorporeal right of way, although an action on the case might be maintained for its obstruction, or a suit in equity to restrain an interference therewith.⁹ Nor can an action for unlawful entry, unaccompanied by actual force, be maintained, under the statute of New Mexico, on the ground of such entry being constructively forcible.¹⁰

§ 6454. **Constitutionality.**—In Washington, the forcible entry and detainer act,¹¹ providing that plaintiff may have a writ of restitution before judgment on filing a bond, etc., is not in violation of the fourteenth amendment of the federal constitution, prohibiting the state from depriving a person of property without due process of law.¹²

§ 6455. **Forcible entry defined.**—Under the California statute, every person is guilty of a forcible entry who either—1. By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters upon or into any real property; or, 2. Who, after entering peaceably upon real property, turns out, by force, threats, or menacing conduct, the party in possession.¹³ All former acts on this subject were repealed by the code on the 1st of January, 1873.¹⁴ The act of 1866 used the following language: "If any person shall with violence and strong hand, enter upon or into any lands or building, either by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, or if any person, after entry peaceably, shall turn out by force, or by threats, or by menacing conduct, the party in possession, such person shall," etc.^{14a} Under this statute it was held that an entry by false keys, or by "breaking open doors, windows, or other parts of a house," is declared by the statute to be a forcible entry;¹⁵ and so, also, is an entry which is effected by "any kind of violence or circumstance of terror" directed

⁸ Warburton v. Doble, 38 Cal. 619.

⁹ Roberts v. Trujillo, 3 N. Mex. 50 (87), 1 Pac. 855.

¹⁰ Romero v. Gonzales, 3 N. Mex. 35 (5), 1 Pac. 171.

¹¹ Wash. Bal. Codes, § 5534.

¹² Morris v. Healy Lumber Co., 33 Wash. 451, 74 Pac. 662.

¹³ Cal. Code Civ. Proc., § 1159; Kerr v. O'Keefe, 38 Cal. 415, 71 Pac. 487.

¹⁴ Hemstreet v. Wassum, 49 Cal. 273.

^{14a} Stats. 1865-1866, p. 768.

¹⁵ Winchester v. Becker, 4 Cal. App. 382, 88 Pac. 296.

towards the person in possession. Each of these modes is as distinct and as complete in itself as the third mode mentioned in the section—that of expulsion of the party in possession by force, threats, or menace after a peaceable entry.¹⁶ The court in this case, under a statute almost identical with the present, makes a clear distinction between a forcible entry into a house and forcible entry into other real estate. In the former case the breaking open doors, windows, or other parts of a house, is of itself a forcible entry, while in all other cases there must be some kind of violence or circumstance of terror directed towards the person in possession. The punctuation in the latter clause is the same in both acts. Terror is a state or condition of the mind. The obvious conclusion is that in order to constitute a forcible entry upon lands as distinguished from houses, some person or persons must be present to be terrified by the violence or other circumstances of terror. If no one is present, the entry is mere trespass.¹⁷ If there is no right of entry, and if followed by demand of possession by the plaintiff, and a refusal to surrender it by the defendant, it constitutes a forcible detainer under subdivision 2 of section 1160 of the California Code of Civil Procedure, which is the same as section 3 of the act of 1866, and prior to which time there was no similar statute. Force, either actually applied or justly to be feared by the conduct of the defendant, is essential to the support of this action.¹⁸ To sustain an action of forcible entry, or forcible and unlawful detainer, actual force, threats of violence in the entry, or the just apprehension of violence to the person, must be shown to have existed, unless the detainer be riotous.¹⁹

In Colorado, it is necessary to show that force or appearances tending to inspire a just apprehension of violence were used in obtaining possession; and it is not sufficient that entry was made by defendant's employees, who seeded the land, but did not disturb the residence.²⁰

§ 6456. Forcible entry and detainer—Who liable.—One who, with armed men, enters upon land inclosed with a fence, and

¹⁶ *Brawley v. Risdon Iron Works*, 38 Cal. 677.

¹⁷ *Frazier v. Hanlon*, 5 Cal. 156.

¹⁸ *Id.*

¹⁹ *Id.* But see *Brawley v. Risdon Iron Works*, 38 Cal. 676. Compare

Frazier v. Hanlon, 5 Cal. 156; *State v. Mills*, 104 N. C. 905, 17 Am. St. Rep. 706, 10 S. E. 676.

²⁰ *Goad v. Heckler*, 19 Colo. App. 479, 76 Pac. 542.

in possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of forcible entry and detainer.²¹ A vendee holding possession after failure to comply with his agreement to purchase land is guilty of unlawful detainer.²² A landlord entitled to the possession may, in the absence of a tenant wrongfully in possession, take the possession himself and place another tenant in charge.²³ Several persons were owners of separate tracts of land with an outside fence which formed a common inclosure; but the division lines of the separate tracts within the common inclosure were well known and defined, and each person cultivated his own tract. A. and B., two of these owners, disposed of their tract to C. Soon after this D., who was the owner of another tract within the inclosure, went upon the tract sold to C., and commenced plowing. C. went to D., took hold of his horses, and commenced turning them from the tract, when D. drew a pistol, and aiming it at him, threatened to hurt him if he did not leave. D. continued plowing the land. It was held that the acts committed by D. clearly amounted to a forcible entry and detainer, and that the general outside fence constituted as full and complete an actual possession in the owner of each separate tract as though it had been inclosed by a lawful fence.²⁴

§ 6457. **Gist of action.**—A complaint in an action under the forcible entry and detainer act, other than actions against tenants holding over as provided in said act, does not state facts sufficient to constitute a cause of action unless it allege a forcible entry or a forcible detainer.²⁵ If the complaint charges a forcible entry with a multitude of people, and a forcible and unlawful detainer, the forcible entry is the gist of the action.²⁶

§ 6458. **Injunction.**—Where parties threaten to take forcible possession of property, and the complaint does not aver the insolvency of the defendants, and that there is no adequate remedy

²¹ *Watson v. Whitney*, 23 Cal. 375.

²² *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278.

²³ *Goldstein v. Webster*, 7 Cal. App. 705, 95 Pac. 677.

²⁴ *Hussey v. McDermott*, 23 Cal. 413.

²⁵ *McEvoy v. Igo*, 27 Cal. 375; *Hislop v. Moldenhauer*, 21 Or. 208, 27 Pac. 1052; *Morse v. Boyde*, 11 Mont. 247, 28 Pac. 260; *Holland v. Green*, 62 Cal. 67.

²⁶ *McMinn v. Bliss*, 31 Cal. 122.

at law, an injunction will not be granted. Where forcible possession is taken, forcible entry and detainer would be a speedy mode of regaining possession, and for other damages the usual proceedings at law would suffice.²⁷ Injunction will not be granted to restrain the execution of a judgment in forcible entry and detainer against a husband, for land claimed by the wife as her separate estate, upon the ground that she was not made a party to the forcible entry suit, or that she was a sole trader.²⁸ An entry by virtue of a mandatory injunction, though it afterwards be dissolved, is not unlawful forcible entry and detainer.²⁹

§ 6459. **Force.**—Force must be shown, or at least appearances tending to inspire a just apprehension of violence, in obtaining the land.³⁰ S. was in possession of a quartz-mill under a lease. The mill had been run until one or two o'clock in the morning, when the employees of the plaintiff closed up and retired to rest in the mill. Before daylight, and while the hands were actually sleeping in the mill, and the products of the last day's work were still in the amalgamating tubs, the defendants—some five or six in number—entered the mill, took possession, commenced tearing down the stamps under pretense of making repairs, and retained possession against repeated demands and protest of the plaintiff and his employees. It was held that these facts constitute sufficient evidence of force to maintain the action of forcible entry.³¹ Where in ejectment by B. against K., a writ of restitution was issued on judgment in favor of B., and under it K. was removed from the land by the proper officer, and W. put in possession as agent of B., and then, about a month afterwards, W. leased the premises to H., it was held that K. cannot maintain forcible entry and detainer against H., the lessee, on the ground that the act of the officer in removing and putting W. in possession was tortious, because not justified by the writ.³² Approaching plaintiff's agents on the land, flourishing a deadly weapon, and ordering them off the premises constitute forcible entry.³³

²⁷ Tomlinson v. Rubio, 16 Cal. 202.

²⁸ Saunders v. Webber, 39 Cal. 287.

²⁹ Franz v. Saylor, 12 Okla. 282,
71 Pac. 217.

³⁰ Goad v. Heckler, 19 Colo. App.
479, 76 Pac. 542.

³¹ Scarlett v. Lamarque, 5 Cal. 63;

commented on in Fogarty v. Kelly, 24
Cal. 319.

³² Kennedy v. Hamer, 19 Cal. 375;
Janson v. Brooks, 29 Cal. 214.

³³ Highland Park Oil Co. v. West-
ern Mineral Co., 1 Cal. App. 340, 82
Pac. 228.

§ 6460. **Trespass compared.**—Facts which might constitute a mere trespass upon property have never been held to sustain the action of forcible and unlawful detainer.³⁴ So of one who enters upon land for the purpose of cutting and taking away grass or crops growing thereon, without any intention of taking possession of the land, and without residing thereon.³⁵ Where one person has a house upon a portion of a tract of land of one hundred acres which he is occupying, and another person enters upon another part of the tract and erects a house, without doing anything further, this act does not constitute a forcible entry upon and detainer of the whole tract.³⁶ A sheriff is not guilty of a forcible entry if, acting in good faith, by virtue of a writ of restitution, he removes from the premises a person against whom the writ does not run, and who is not in privity with any one against whom the writ does run.³⁷

§ 6461. **Forcible detainer versus ejectment.**—The question of title cannot be raised, and if the right of possession rests upon paramount title, legal or equitable, ejectment is the proper action, and not forcible entry and unlawful detainer.³⁸ But if several claimants reside on the land, and one of them is held entitled to the homestead entry by the land office, he may bring forcible entry and detainer against the others.³⁹ The declaration of the defendant to the plaintiff that he will not go off the premises unless put off by force or by law, does not constitute a forcible detainer.⁴⁰ The mere surmise of a person, that if he attempts to regain possession force will be used to prevent it, is not enough to show a forcible detainer; but an attempt must be made to gain possession, and either force or threats of force used to resist it.⁴¹ P. had possession of a lot of land, by having it inclosed with a fence, but did not reside on it, nor have a house on it. M. and D. entered into possession, and built a house on the premises and moved into it. Five days afterwards an agent of P. went to the premises and told M. and D. that he had come there to take possession for P. They replied that it would be very foolish to

³⁴ *Frazier v. Hanlon*, 5 Cal. 156;
Merrill v. Forbes, 23 Cal. 379.

³⁵ *Merrill v. Forbes*, 23 Cal. 379.

³⁶ *Thompson v. Smith*, 28 Cal. 527.

³⁷ *Janson v. Brooks*, 29 Cal. 214.

³⁸ *Jones v. Seawall*, 13 Okla. 711, 76 Pac. 1541.

³⁹ *Cope v. Braden*, 11 Okla. 291, 67 Pac. 475; *Hackney v. McKee*, 12 Okla. 401, 75 Pac. 535.

⁴⁰ *Hodgkins v. Jordan*, 29 Cal. 577.
⁴¹ *Id.*

give up the lots after making improvements on them, that they would not leave, and that it would take a pretty good force to put them off; that they had paid their money for the lots, and they would be d—d if they would leave. To another agent of P., M. and D. used substantially the same language. It was held that this did not amount to a forcible entry or unlawful detainer; that such acts amounted merely to a trespass and ouster of P., for which ejectment was the proper remedy.⁴² A naked avowal of an intention to keep possession, and actually keeping possession, do not necessarily constitute such force or threat of force as to render a detainer forcible where there has been an unlawful entry, unless such avowal is made in answer to a demand for possession by the party claiming to have been ousted, and is accompanied by some act or word of the party making the unlawful entry showing an intent on his part to maintain the possession by force.⁴³ If the entry of the defendant was lawful, the plaintiff cannot, when his right to the possession has expired, expel him therefrom, or by using or threatening force make his entry unlawful.⁴⁴ However, after being served with notice to quit he becomes guilty of unlawful detainer.⁴⁵

§ 6462. **Unlawful entry.**—An unlawful entry is a peaceable entry made in bad faith,—that is to say, without any *bona fide* claim or color of legal right to enter,—and not a peaceable entry made in good faith, although wrongfully,—that is to say, in the belief that there is a legal right to enter.⁴⁶ The plaintiff must have had the actual possession when the wrongful or forcible entry was made; and if a forcible detainer alone is complained of, the entry of the defendant must have been unlawful.⁴⁷

§ 6463. **Actual possession.**—The complaint must show that the plaintiff was in the actual, and not merely in the constructive, possession or occupancy of the premises within five days preceding the entry; but that does not require an actual residence or bodily presence.⁴⁸ The possession of a servant is

⁴² Polack v. McGrath, 25 Cal. 56.

⁴³ Fogarty v. Kelly, 24 Cal. 317.

See Cal. Code Civ. Proc., § 1160.

⁴⁴ Owen v. Doty, 27 Cal. 502.

⁴⁵ Columbia etc. R. R. v. Moss, 44 Wash. 589, 87 Pac. 951.

⁴⁶ Shelby v. Houston, 38 Cal. 410.

⁴⁷ Owen v. Doty, 27 Cal. 502. But see Cal. Code Civ. Proc., § 1160.

⁴⁸ Shelby v. Houston, 38 Cal. 410;

Wilson v. Shackelford, 41 Cal. 630;

Leroux v. Murdock, 51 Cal. 541;

Spiers v. Duane, 54 Cal. 176; Gid-

dings v. Land & Water Co., 83 Cal. 96, 23 Pac. 196.

the possession of his principal.⁴⁹ Possession need not be for any definite time, but it must be peaceable and quiet.⁵⁰ Nor is cultivation necessary, nor improvement, as contradistinguished from the erection of substantial fences or barriers marking the line of the premises over which control is asserted. The erection of a substantial fence and planting of ornamental trees around a city lot amount to actual possession.⁵¹ And a natural barrier, as a precipitous cliff or the shore of a deep stream or the ocean, may serve as a part of the inclosure.⁵² Neither a good and substantial fence nor a residence upon premises is necessary to a peaceable and actual possession. There may be an actual possession without fences or inclosure of any kind.⁵³ A scrambling possession, or one obtained by force or fraud, and maintained for a time by threats or violence, is insufficient.⁵⁴ A lease of premises containing a provision that the lessor may during the term occupy all or any part of the premises, does not prevent the lessor from maintaining forcible entry and detainer against a stranger, if the lessor continues to occupy notwithstanding the lease; and he may prove such occupation on the trial.⁵⁵ One who has simply worked on a mining claim for prospecting purposes, but has ceased work, and has not occupied the same for several months, cannot maintain forcible detainer against one who enters thereon and refuses to deliver possession on demand.⁵⁶

§ 6464. **Possession essential—Right to protect.**—In actions of forcible entry and detainer, the fact of possession, and not the right of possession, is what is to be determined; and plaintiff need not prove right of possession.⁵⁷ The plaintiff must show an actual, peaceable, and exclusive possession in him; a scrambling or interrupted possession is not sufficient.⁵⁸ The plaintiff must have been in actual possession; and when the land is public land, not taken up under our possessory act, nor under the fed-

⁴⁹ *Baker v. Dickson*, 62 Cal. 19.

⁵⁰ *Highland Park Oil Co. v. Western Mineral Co.*, 1 Cal. App. 340, 82 Pac. 228.

⁵¹ *Gray v. Collins*, 42 Cal. 152.

⁵² *Conroy v. Duane*, 45 Cal. 597; *Knowles v. Crocker's Estate*, 149 Cal. 278, 86 Pac. 715.

⁵³ *Goodrich v. Van Landingham*, 46 Cal. 601.

⁵⁴ *Bowers v. Cherokee Bob*, 45 Cal. 495; *Conroy v. Duane*, 45 Cal. 597;

Voll v. Butler, 49 Cal. 74; *Spiers v. Duane*, 54 Cal. 176; *Tivnen v. Monahan*, 76 Cal. 131, 18 Pac. 144; *Brooks v. Warren*, 5 Utah, 118, 13 Pac. 175.

⁵⁵ *Bowers v. Cherokee Bob*, 45 Cal. 495.

⁵⁶ *Laird v. Waterford*, 50 Cal. 315.

⁵⁷ *Mitchell v. Davis*, 20 Cal. 45;

Gore v. Altice, 33 Wash. 335, 74 Pac. 556.

⁵⁸ *Id.*; *House v. Keiser*, 8 Cal. 499.

eral laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient.⁵⁹ One who in the morning enters upon a portion of a tract of land in the possession of another, and incloses it with a fence, and puts a house on it, before sundown, does not acquire such a peaceable possession as to enable him to maintain forcible entry and detainer against the possessor, who at sundown destroys the same house and fence and drives him away.⁶⁰ One entering within the inclosure of another, and building a house there, and asserting a claim to the inclosed land, while the other is living within the inclosure and asserting his possession to the land, does not acquire such an actual possession as to enable him to maintain the action, unless it is to the land on which his house actually stands, and so much as is absolutely necessary to the occupation of the house.⁶¹ A person has possession of a lot twenty-eight feet by one hundred and thirty-two sufficient to enable him to maintain forcible entry and detainer, if it adjoins a lot upon which he lives, and he has a stable on it, and cultivates it, even though the fence inclosing the whole is not very substantial.⁶² One who is in possession of a tract of land has the right to resist and expel an intruder, if the resistance and expulsion take place before the possession of the intruder had become actual and peaceable.⁶³ The law will not permit a party to take forcible possession even of his own lands, if they are in the peaceable though wrongful possession of another; and if he does so, he will not only be compelled to restore the possession before his title will be investigated, but will also be punished by fine and further judgment for treble damages for his own infraction of the laws.⁶⁴

§ 6465. **Actual possession—Occupation of premises.**—Where plaintiff had been in the peaceable and quiet possession and use of the premises, through his agent and by his tenants, and the building, being unrented, he had locked the door and taken the key to his office, he was in the “actual possession” of the prem-

⁵⁹ Preston v. Kehoe, 15 Cal. 315.

⁶⁰ Hoag v. Pierce, 28 Cal. 187.
See Anderson v. Mills, 40 Ark. 192;
Salinger v. Gunn, 61 Ark. 414, 33 S.
W. 959.

⁶¹ Ross v. Roadhouse, 36 Cal. 580.
See, as to actual possession by in-

closure under the Van Ness ordinance, Satterlee v. Bliss, 36 Cal. 489.

⁶² Valencia v. Couch, 32 Cal. 340,
91 Am. Dec. 589.

⁶³ Hoag v. Pierce, 28 Cal. 187.

⁶⁴ Mitchell v. Davis, 23 Cal. 381.

ises, within the statute of forcible entry and detainer.⁶⁵ The occupant of lands is one who, within five days preceding such unlawful entry, was in the peaceable and undisturbed possession of such lands or tenements.⁶⁶ The true intent and meaning of the legislature in the use of the word "occupant" is found in the words "peaceable and undisturbed possession." And the plaintiff is not required to show possession which differs at all from the possession which he would have to show were he seeking relief in an action for forcible entry.⁶⁷ It has never been considered that an actual residence, a personal presence, was in all cases indispensable to actual possession. On the contrary, actual possession as much consists of a present power and right of dominion as an actual corporal presence in the house.⁶⁸ Under this rule, the plaintiff might have had "a peaceable and undisturbed possession," notwithstanding the fact that he did not reside in the house.⁶⁹

§ 6466. Joinder of and distinction between causes of action.—

A cause of action in unlawful detainer cannot be joined with one for forcible entry or for forcible detainer.⁷⁰ And it would seem that a cause of action for forcible entry could not be joined with one for forcible detainer.⁷¹ F. brought an action against K. for an unlawful entry and forcible detainer. F. did not reside on the premises, and his only possession consisted in an inclosure and cultivation. K. went within the inclosure in the night-time, erected a cabin, and, at some subsequent period of time, declared he would keep possession by force. The court instructed the jury that if they found "that the defendant entered upon the premises in the night-time, during the hours of sleep, while the plaintiff was in the actual and peaceable possession of the same, and that he took possession and avowed the intention to keep possession, and actually did keep possession, it was sufficient evidence of force to maintain the action of forcible entry and detainer, and the jury should find for plaintiff." It was held that the instruction was erroneous, as applied to the testimony in this case, because that portion of it relating to K.'s intention to keep pos-

⁶⁵ *Minturn v. Burr*, 16 Cal. 107.

⁶⁶ Cal. Code Civ. Proc., § 1160.
See *Bank of California v. Taaffe*, 76
Cal. 626, 18 Pac. 781; *Tivnen v.*
Monahan, 76 Cal. 131, 18 Pac. 144.

⁶⁷ *Shelby v. Houston*, 38 Cal. 410.

⁶⁸ *Minturn v. Burr*, 16 Cal. 107.

⁶⁹ *Shelby v. Houston*, 38 Cal. 410.

⁷⁰ *Polack v. Shafer*, 46 Cal. 270.

⁷¹ *Treat v. Forsyth*, 40 Cal. 484.
But see *Shelby v. Houston*, 38 Cal.
410.

session made no reference to any demand on the part of F. for possession, and because the instruction was framed as though it related to a question of forcible entry, and not forcible detainer.⁷²

§ 6467. **Proceedings under California statute.**—The complaint must contain a statement of the facts on which the plaintiff seeks to recover, together with a reasonably certain description of the premises; and the plaintiff may also set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer, and claim damages therefor. If the unlawful detainer charged be after default in the payment of rent, the amount of such rent must be stated.⁷³ On filing the complaint, a summons must be issued thereon.⁷⁴ It must require the defendant to appear and answer within three days after the service of the summons upon him, and must notify him that if he fails to so appear and answer the plaintiff will apply for the relief demanded. In all other respects the summons or any *alias* summons is issued, served, and returned as a summons in a civil action.⁷⁵ If the complaint presented establishes, to the satisfaction of the judge, fraud, force, or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.⁷⁶ If the defendant does not appear, the court must enter his default, and render judgment for the plaintiff as prayed for in the complaint.⁷⁷ The defendant may answer or demur on or before the day fixed for his appearance.⁷⁸ Whenever an issue of fact is presented it must be tried by a jury, unless such jury is waived.⁷⁹ Upon the trial, if it appears from the evidence that the defendant has been guilty of forcible entry or forcible detainer, and other than the offense charged in the complaint, the judge must order the complaint to be forthwith amended to conform to the proofs. Such amendment is not ground for continuance unless the defendant by affidavit shows good cause therefor.⁸⁰ An appeal taken by defendant does not stay proceedings upon the judgment unless the judge or justice so

72 *Fogarty v. Kelly*, 24 Cal. 317.

73 Cal. Code Civ. Proc., § 1166, as amended 1907.

74 *Id.*

75 Cal. Code Civ. Proc., § 1167.

76 Cal. Code Civ. Proc., § 1168.

77 Cal. Code Civ. Proc., § 1169.

78 Cal. Code Civ. Proc., § 1170.

79 Cal. Code Civ. Proc., § 1171.

80 Cal. Code Civ. Proc., § 1173. As to verdict and judgment, see same code, § 1174.

directs.⁸¹ The provisions of part two of the California Code of Civil Procedure relative to new trials and appeals apply in these proceedings, except so far as they are inconsistent with these special provisions.⁸²

To maintain an action of forcible entry, the plaintiff must show that he was in the actual and peaceable possession of the property entered upon; that the defendant, by some kind of violence or circumstance of terror, entered into or upon the property, and so turned the plaintiff out and took and held possession of it himself; or that after making a peaceable entry the defendant, by force, threats, or menacing conduct, turned the plaintiff out and took the possession.⁸³ In an action under section 1161 (subd. 1) of the Code of Civil Procedure, if the complaint avers defendant's entry under a lease pleaded not in precise words, but by its legal effect, an answer denying the making of the lease pleaded in the complaint, and affirmatively setting forth in full the contract between the parties, is sufficient to present issues for determination.⁸⁴

§ 6468. Jurisdiction.—Justices' courts have concurrent jurisdiction with the superior courts within their respective townships in actions of forcible entry and detainer, where the rental value of the property entered upon or unlawfully detained does not exceed twenty-five dollars per month, and the whole amount of damages claimed does not exceed two hundred dollars.⁸⁵ This provision applies to both actions of forcible entry and unlawful detainer, though such actions are separately defined.⁸⁶ An allegation of ownership in the complaint, being unnecessary and not denied, does not oust the justice court of jurisdiction on the theory that the question of title to land is involved.⁸⁷ In Oklahoma, probate courts, being vested with the same jurisdiction as justices of the peace, have jurisdiction in actions of forcible entry and unlawful detainer.⁸⁸

⁸¹ Cal. Code Civ. Proc., § 1176.

⁸² Cal. Code Civ. Proc., § 1178. As to relief of tenant against forfeiture of lease, see same code, § 1179.

⁸³ *Castro v. Tewksbury*, 69 Cal. 562, 11 Pac. 339.

⁸⁴ *Shamp v. White*, 106 Cal. 220, 39 Pac. 537.

⁸⁵ Cal. Code Civ. Proc., § 113;

Beam v. Parks, 9 Ariz. 151, 80 Pac. 324.

⁸⁶ *Ivory v. Brown*, 137 Cal. 603, 70 Pac. 657.

⁸⁷ *Heiney v. Heiney*, 43 Or. 577, 73 Pac. 1038.

⁸⁸ *Anderson v. Ferguson*, 12 Okla. 307, 71 Pac. 225; *McClung v. Penny*, 11 Okla. 474, 69 Pac. 499.

If a city court have jurisdiction, and without authority certifies a case to the higher court, jurisdiction remains in the lower court, and its exercise may be resumed without a new process.⁸⁹

Though a justice of the peace renders judgment upon an erroneous construction of the law, it cannot be reviewed upon a writ of *certiorari* so long as he has jurisdiction. Appeal is the proper remedy.⁹⁰

§ 6469. **Limitations.**—The right of action between adverse claimants of a homestead accrues when the contest is finally adjudicated in the land-office.⁹¹ The action is commenced like any other, and in Oklahoma and Washington it is by issue of summons.⁹² Possession for more than two years by a tenant not paying rent, yet with consent of the landlord, does not bar an action for unlawful detainer.⁹³

§ 6470. **The complaint.**—The plaintiff, in his complaint, which shall be verified, must set forth the facts on which he seeks to recover, and describe the premises with reasonable certainty, and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer, and claim damages therefor. In case the unlawful detainer charged is after default in the payment of rent, the complaint must state the amount of such rent.⁹⁴ In Oklahoma, it is not necessary to state particular facts, but the language of the statute is sufficient.⁹⁵ Unlawful entry and forcible detainer may be alleged in the same count.⁹⁶ Strict rules are not applicable to justice court pleadings, and a statement in the terms of the statute may be sufficient.⁹⁷ And it is better to use the statutory term "actual possession." The averment of title in plaintiff may be treated as surplusage.⁹⁸ An allegation

⁸⁹ *Armour Packing Co. v. Howe*, 68 Kan. 663, 75 Pac. 1014.

⁹⁰ *McAnish v. Grant*, 44 Or. 57, 74 Pac. 396.

⁹¹ *Cope v. Braden*, 11 Okla. 291, 67 Pac. 475.

⁹² *Greenameyer v. Coate*, 12 Okla. 452, 72 Pac. 377; *Security Sav. etc. Co. v. Hackett*, 27 Wash. 247, 67 Pac. 607.

⁹³ *Donahoe v. Mitchem*, 13 Okla. 383, 74 Pac. 903.

⁹⁴ Cal. Code Civ. Proc., § 1166.

⁹⁵ *Greenameyer v. Coate*, 12 Okla. 452, 72 Pac. 377.

⁹⁶ *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447.

⁹⁷ *Armour Packing Co. v. Howe*, 68 Kan. 663, 75 Pac. 1014; *Watson v. Whitney*, 23 Cal. 376.

⁹⁸ *More v. Del Valle*, 28 Cal. 170; *McClung v. Penny*, 11 Okla. 474, 69 Pac. 499; *Heiney v. Heiney*, 43 Or. 577, 73 Pac. 1038.

of ownership in fee is not a sufficient allegation of "actual possession."⁹⁹ A complaint alleging possession, and that plaintiff was engaged in cultivating the premises as a homestead settlement, and that defendant forcibly and without right entered and ejected plaintiff, is sufficient.¹⁰⁰

A complaint alleging that plaintiff was in possession, that defendants, during the absence of plaintiff, entered on the premises, broke open the inclosures and the door of the dwelling-house and entered therein, and by force continued to occupy the premises, and refused to peaceably surrender the possession thereof to plaintiff after due notice given, is a sufficient complaint.¹⁰¹ In Washington, in an action to recover real estate, plaintiff should embody an abstract of title in the complaint,¹⁰² and failure to do so releases defendant from answering affirmatively upon the subject of title.¹⁰³ The notice to quit, being made a part of the complaint, may assist the complaint proper in describing the premises and alleging possession.¹⁰⁴ A complaint in unlawful detainer alleging that defendant held over after the specified term of the lease sufficiently avers that he kept possession wrongfully and unlawfully.¹⁰⁵

§ 6471. **Allegations of complaint construed.**—The allegations of a complaint must be construed most strongly against the pleader. A complaint that alleges that he is in possession in one place, and in another avers that he is not, shows no cause of action.¹⁰⁶ If the plaintiff sues upon one only, or upon two, of the causes of action mentioned in the forcible entry and detainer act, and the testimony makes a cause of action named in the act, but not set out in the complaint, it is the duty of the court, on its own motion, or on the motion of the plaintiff, to permit him to amend his complaint to suit the testimony.¹⁰⁷ A complaint in forcible entry and detainer in two counts, the first of which

⁹⁹ McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

¹⁰⁰ Spellman v. Rhode, 33 Mont. 21, 81 Pac. 395.

¹⁰¹ Gore v. Altice, 33 Wash. 335, 74 Pac. 556.

¹⁰² 2 Bal. Annot. Codes & Stats., § 5550.

¹⁰³ McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100.

¹⁰⁴ Quandt v. Smith, 28 Wash. 664, 69 Pac. 369.

¹⁰⁵ Stanford Land Co. v. Steidle, 28 Wash. 72, 68 Pac. 178.

¹⁰⁶ Dickinson v. Maguire, 9 Cal. 46. As to complaint in forcible entry and detainer liberally construed, see Chambers v. Hoover, 3 Wash. T. 107, 13 Pac. 466.

¹⁰⁷ Valencia v. Couch, 32 Cal. 340, 91 Am. Dec. 589. As to when complaint may be amended, see Cal. Code Civ. Proc., § 1173.

alleges the possession of the plaintiff and the unlawful entry of defendant, without alleging a withholding of any character, or a demand of possession or refusal, or the use of any force or menace; and in the second count shows that, the defendant being in the possession, plaintiff demanded that he surrender possession, which defendant refused to do, but still detains it by force, etc., is bad on demurrer, as neither count in itself states a cause of action.¹⁰⁸ A complaint which alleges, in substance, that on a certain day the defendant unlawfully entered upon the land, and turned the plaintiff out of the possession thereof, by threats and menacing conduct, and ever since that time has held, and still does hold, the possession thereof, by threats of violence against the plaintiff, is sufficient under the California statute.¹⁰⁹

A complaint alleging the facts of vendee's failure to conform to his agreement of purchase and forfeiture thereby, but that he withholds the premises, need not allege plaintiff to be the owner, or that the agreement was in writing.¹¹⁰ Such a vendor may have a decree of foreclosure and sale of the premises under his vendor's lien without a prayer for equitable relief.¹¹¹ A vendor cannot eject the vendee, if time is not of the essence of the contract, unless the contract has been abandoned.¹¹²

§ 6472. **Separate statement of causes of action.**—Forcible entry and forcible detainer are separate causes of action, and ought to be separately stated in different counts in the complaint. If not so stated, the complaint is bad on demurrer; but if the complaint is not demurred to, the objection is waived. Fraud, if relied on, should also be separately stated.¹¹³ But it seems that unlawful entry and forcible detainer may be alleged in the same count.¹¹⁴

§ 6473. **Allegations of complaint construed—Description.**—In forcible entry and detainer, a description of the land, sufficiently definite to enable the administration of substantial justice, is all that is required in actions before justices of the peace.¹¹⁵

¹⁰⁸ Barlow v. Burns, 40 Cal. 351.

¹⁰⁹ Holland v. Green, 62 Cal. 67.

¹¹⁰ Ruth v. Smith, 29 Colo. 154, 68 Pac. 278.

¹¹¹ Gumaer v. Draper, 33 Colo. 122, 79 Pac. 1040.

¹¹² Brixen v. Jorgensen, 28 Utah,

290, 107 Am. St. Rep. 720, 78 Pac. 674.

¹¹³ Valencia v. Couch, 32 Cal. 340, 91 Am. Dec. 589.

¹¹⁴ Kerr v. O'Keefe, 138 Cal. 415, 71 Pac. 447.

¹¹⁵ Hernandez v. Simon, 4 Cal. 182.

Where the complaint described the premises as "about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land bounded and described as follows, to-wit," and then went on to give the metes and bounds of a tract containing one hundred and forty-six acres, "the said ten rods square being situated," etc., the proof, among other things, showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract, it was held that the variance in the description of the premises did not prejudice appellant; the question was one of identity, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises.¹¹⁶ "That tract or parcel of land situated in the county of Santa Barbara, and known as the Rancho Sespe, granted by the Mexican nation to Don Carlos Antonio Carrillo, by grant, dated November 29, 1833, and bounded and described as follows: Bounded by the missions San Fernando and San Buenaventura, situated in the then jurisdiction of Santa Barbara, containing six square leagues, a little more or less," is a sufficient description.¹¹⁷ In an action brought in M. county, the land was described as "south of O. river," whereas the county lay north of it; but enough was recited elsewhere in the complaint to identify the land with property shown to be situated in M. county. It was held that the description was sufficient for the purpose of the action, and the words "south of O. river," might be rejected as surplusage.¹¹⁸ Where the complaint asks the recovery of possession of a whole quarter-section, and the proof shows the plaintiff to be in possession of a very small part of it, the variance is held to be immaterial.¹¹⁹ The description of land in a complaint in an action of forcible entry and detainer, from which the land is susceptible of being easily and definitely located by a surveyor, is sufficiently definite and certain.¹²⁰

§ 6474. The same—Possession, averment of.—The objection to a complaint in forcible entry and detainer, that it does not aver "actual possession," the word "possession" only being used, was

¹¹⁶ *Paul v. Silver*, 16 Cal. 73. See *Green v. Palmer*, 15 Cal. 411, 76 Am. Dec. 492.

¹¹⁷ *More v. Del Valle*, 28 Cal. 170.

¹¹⁸ *Silvey v. Summer*, 61 Mo. 253.

¹¹⁹ *Seeley v. Adamson*, 1 Okla. 78, 26 Pac. 1069.

¹²⁰ *Stillman v. Palis*, 134 Ill. 532, 25 N. E. 786.

a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended; but it cannot be urged in the supreme court for the first time.¹²¹ Peaceable and undisputed possession need not be pleaded in forcible detainer, if plaintiffs' right of possession is set out.¹²² But it is an essential averment in the complaint, in an action of forcible entry and unlawful detainer, that at the time of the alleged forcible entry plaintiff was in the actual possession of the premises; and in order to maintain the action, plaintiff must prove this averment on the trial.¹²³ If the complaint in forcible entry and detainer sufficiently shows an actual peaceable possession in plaintiff, it will be sufficient without the use of the word "actual"; but it is better to use the statutory term.¹²⁴ An averment of title in forcible entry and detainer may be treated as surplusage.¹²⁵ A complaint alleging that the plaintiffs are entitled to and possessed of the "entrances and exits" of a certain tract of land, and that the defendant illegally and by force entered upon the land, and withholds the same, makes no claim to the property, and will not sustain a judgment.¹²⁶

§ 6475. **Pleading—Conclusions of law.**—A complaint in an action of unlawful detainer which alleges that certain of the defendants were in possession of the premises in controversy as tenants of the plaintiff; that certain other defendants claim some right of possession under said tenants; that the notice to defendants to pay rent or surrender the premises was duly and legally served in accordance with the laws of the state relating thereto, merely states conclusions of law, and is not sufficient under the Washington statute,^{126a} requiring the plaintiff in such action to "set forth the facts on which he seeks to recover."¹²⁷ So where in such action the plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or provisions of the decree was "that under and by virtue of being the owner of said certificate,

¹²¹ *Minturn v. Burr*, 16 Cal. 107.

¹²² *Kennedy v. Dickie*, 27 Mont. 70, 69 Pac. 672; Mont. Rev. Codes, §§ 7270, 7281.

¹²³ *Cummins v. Scott*, 23 Cal. 526.

¹²⁴ *More v. Del Valle*, 28 Cal. 170.

¹²⁵ *Id.* See *Hall etc. Furniture Co. v. Wilbur*, 4 Wash. 644, 30 Pac. 665.

¹²⁶ *Roberts v. Trujillo*, 3 N. Mex. 50 (87), 1 Pac. 855.

^{126a} *Laws* 1891, p. 179.

¹²⁷ *Lowman v. West*, 8 Wash. 335, 36 Pac. 258.

and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances," this allegation was held to be simply a conclusion of law, and insufficient to constitute a cause of action.¹²⁸

§ 6476. **The same—Reply unnecessary.**—It seems that in an action for unlawful detainer, under the Washington code,^{128a} a reply is not necessary to affirmative matter contained in the answer.¹²⁹ A complaint in unlawful detainer for the possession of unsurveyed government land must allege title in the plaintiff, and that the plaintiff was entitled to the possession at the time the defendant entered, and when demand was made upon him for the possession, and that the defendant unlawfully withheld the premises, and that service of demand for possession had been made upon him, and without these material allegations the complaint is fatally defective.¹³⁰

§ 6477. **Amendment of complaint.**—It is proper to admit an amendment of the complaint to make it conform to the proof as to the date of termination of a lease, though the motion to amend is made pending a motion for nonsuit because of variance.¹³¹

§ 6478. **The summons.**—Upon filing the complaint, a summons must be issued thereon.¹³² It must require the defendant to appear and answer within three days after the service of the summons upon him, and must notify him that if he fails to so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint. In all other respects the summons, or any *alias* summons in such proceedings, must be issued and served and returned in the same manner as summons in a civil action.¹³³ A summons issued in such an action, though out of a justice court, may be served upon defendant out of the county wherein the action is brought.¹³⁴

¹²⁸ Laffey v. Chapman, 9 Colo. 304, 12 Pac. 152.

^{128a} Wash. Bal. Codes, §§ 5549-5551.

¹²⁹ Fife v. Olson, 5 Wash. 789, 32 Pac. 766.

¹³⁰ Barnes v. Cox, 12 Utah, 47, 41 Pac. 557.

¹³¹ Earl Orchard Co. v. Fava, 138 Cal. 76, 70 Pac. 1073.

¹³² Cal. Code Civ. Proc., § 1166.

¹³³ Cal. Code Civ. Proc., § 1167.

¹³⁴ Cal. Code Civ. Proc., § 848.

§ 6479. **Parties plaintiff.**—The remedy is a summary one, given by statute to protect the possession, and cannot be extended by implication to any other than the real occupants. A landlord cannot sue in this form in his own name, for an unlawful entry upon the possession of the tenant.¹³⁵ It can only be maintained by the person ousted; and his grantee cannot maintain the action.¹³⁶ A tenant in common cannot maintain an action of forcible entry and detainer against his cotenant. The land must first be partitioned.¹³⁷ One or more tenants in common may maintain the action as against third persons without joining his cotenant.¹³⁸ Where a lessor reserves the right to occupy all or any part of the leased premises during the term, and does continue to occupy, notwithstanding the lease, he may maintain the action.¹³⁹ But where a hotel and adjoining grounds are leased, and the lessee inserts a covenant that the lessor may retain and occupy a single room in a hotel and board there, the lessor cannot maintain forcible entry, even as to the room so occupied by him.¹⁴⁰ One in possession of property simply as the agent of another cannot maintain the action in his own name;¹⁴¹ but a tenant at will may.¹⁴² A landlord in possession of land by his tenants is not an "occupant" under subdivision 2 of section 1160 of the California Code of Civil Procedure, concerning forcible detainer, and therefore cannot maintain an action under that subdivision.¹⁴³ A landlord who has executed leases to third persons, giving them the right of possession, still has sufficient interest to maintain an action to recover possession from a former tenant.¹⁴⁴ If, after the execution of a lease, the lessor enters into such a partnership with the lessee as to destroy the lease, the former owner cannot maintain this action against the latter, who has become his partner.¹⁴⁵ The lessee may have the action against his subtenant, upon notice for failure to pay rent.¹⁴⁶

¹³⁵ *Treat v. Stuart*, 5 Cal. 113.

¹³⁶ *House v. Keiser*, 8 Cal. 499.

¹³⁷ *Lick v. O'Donnell*, 3 Cal. 59, 58 Am. Dec. 383.

¹³⁸ *Bowers v. Cherokee Bob*, 45 Cal. 495. See, however, Cal. Code Civ. Proc., §§ 381, 384, 1165. See, also, *Lee Chuck v. Quan Wo Chong*, 91 Cal. 593, 28 Pac. 45.

¹³⁹ *Bowers v. Cherokee Bob*, 45 Cal. 495.

¹⁴⁰ *Polack v. Shafer*, 46 Cal. 270.

¹⁴¹ *Mitchell v. Davis*, 20 Cal. 45.

¹⁴² *Jones v. Shay*, 50 Cal. 508.

¹⁴³ *Hammel v. Zobelein*, 51 Cal. 532.

¹⁴⁴ *Schreiner v. Stanton*, 26 Wash. 563, 67 Pac. 219.

¹⁴⁵ *Pico v. Cuyas*, 47 Cal. 180, 48 Cal. 639.

¹⁴⁶ *Stohl Brewing etc. Co. v. Van Buren*, 45 Wash. 451, 88 Pac. 837.

§ 6480. **Parties defendant.**—An action of forcible entry and detainer will not lie against a party claiming a right to land who is not in actual possession.¹⁴⁷ A person may be guilty of a forcible entry who is not actually present, and does not actively assist therein. He is guilty of an entry made with force by one acting at the time under his direction and procurement.¹⁴⁸ An action under the act concerning forcible entries and unlawful detainers will not lie against a party who has been put in possession by a sheriff in good faith, by virtue of a writ of restitution, even if the person turned out, and who brings the action, was one whom the officer could not lawfully dispossess by virtue of the writ.¹⁴⁹ The action may be brought against husband and wife, notwithstanding the wife is a sole trader.¹⁵⁰ One who goes upon the land several weeks after the alleged ouster, simply as an employee of the persons who ousted the plaintiff, is not guilty of an unlawful entry and forcible detainer.¹⁵¹ One who peaceably enters upon a mining claim which has been prospected by another, but abandoned for several months, is not guilty of a forcible detainer simply for refusing to surrender possession on demand.¹⁵²

§ 6481. **Change of parties.**—A cause of action for unlawful detainer by one entitled to the possession, in case of a transfer of interests of the plaintiff, continues in his grantee,¹⁵³ and it is proper for the court to allow the grantee to be substituted for the original plaintiff.¹⁵⁴ Oral evidence of a transfer of an interest in a possessory claim is not admissible.¹⁵⁵ The assignee of a lease who, before notice to quit, assigned his leasehold and surrendered possession is not liable to an action for unlawful detainer.¹⁵⁶

§ 6482. **Parties—Landlord and tenant.**—Under the old act concerning forcible entries and unlawful detainers, if a landlord sold the leased property, and assigned the lease to the purchaser,

¹⁴⁷ Preston v. Kehoe, 10 Cal. 445.

¹⁴⁸ Minturn v. Burr, 20 Cal. 48.

¹⁴⁹ Janson v. Brooks, 29 Cal. 214.

See Cal. Code Civ. Proc., § 1164.

¹⁵⁰ Howard v. Valentine, 20 Cal. 282. See, also, Saunders v. Webber, 39 Cal. 287; Cal. Code Civ. Proc., §§ 370, 371.

¹⁵¹ Conroy v. Duane, 45 Cal. 597.

¹⁵² Laird v. Waterford, 50 Cal. 315. See, also, as to parties defend-

ant, Hall v. Wallace, 88 Cal. 434, 26 Pac. 360; Pardee v. Gray, 66 Cal. 524, 6 Pac. 389.

¹⁵³ Anderson v. Ferguson, 12 Okla. 307, 71 Pac. 225.

¹⁵⁴ Bradford v. Brennan, 12 Okla. 333, 71 Pac. 655; Okla. Stats., 1893, § 3912.

¹⁵⁵ Buel v. Frazier, 38 Cal. 693.

¹⁵⁶ Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332.

and the tenant did not attorn to the purchaser, or recognize him as landlord, the purchaser could not recover possession of the premises from the tenant.¹⁵⁷ Under the present California statute the successor in interest of the landlord may recover possession regardless of the question of attornment.¹⁵⁸ The tenant cannot, by submitting to being wrongfully turned out of possession under a writ which did not run against him, and then attorning to the plaintiff in the writ, prevent his first landlord from recovering possession against him for non-payment of rent.¹⁵⁹ The relation of landlord and tenant is not dissolved by the execution of papers intended as an assignment of the lease to the landlord, and release and cancellation of the lease. A surrender in fact of the demised premises is essential to the completion of a dissolution of that relation. A possession by the tenants, after the execution of the papers mentioned, of the demised premises, renders them liable to be proceeded against under the act concerning forcible entry and unlawful detainer.¹⁶⁰

§ 6483. **Relation of landlord and tenant.**—The production of a lease in evidence will not of itself prove the relation of landlord and tenant to have existed between the lessor and lessee; but the entry of the lessee under the lease, or a holding by him referable to the lease, must also be proven.¹⁶¹ A., who claimed to be in possession of a tract of coal-bearing land, made a verbal agreement with B. and C., by which they were to prospect for coal until they struck a particular seam or ledge, and before they struck this ledge they were to do all the work, and have two thirds of the claim; but after the ledge was struck the work was to be prosecuted by the parties jointly, A. to bear one third of the expenses, and B. and C. two thirds. It was held that this agreement did not create the relation of landlord and tenant between A. and B. and C., but that it made them tenants in common, or partners in mining, and that the action of unlawful detainer was not the proper remedy for A., if excluded from the premises by B. and C.¹⁶² An action for an unlawful holding over cannot be maintained, unless the relation of landlord and tenant is shown to exist between the plaintiff and defendant at the time of making

¹⁵⁷ *Reay v. Cotter*, 29 Cal. 168.

¹⁵⁸ Cal. Code Civ. Proc., § 1161.

¹⁵⁹ *Calderwood v. Pyser*, 31 Cal. 333.

¹⁶⁰ *Kower v. Gluck*, 33 Cal. 401.

As to the necessary parties defendant, see Cal. Code Civ. Proc., § 1164.

¹⁶¹ *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

¹⁶² *Henderson v. Allen*, 23 Cal. 519.

demand for possession.¹⁶³ Serving the notice and commencing action do not terminate the lease, but the payment of the rent, interest, damages, and costs within five days after judgment keeps the lease alive.¹⁶⁴

§ 6484. **Repairs—Duty of tenant.**—If the embankment of a natural reservoir, which is filled with water by unusual rains, is broken by a stranger, so that the demised premises are injured by the water, the injury is not the act of God or of the elements, and the tenant is bound to repair, even if “damages by the elements or acts of Providence” are excepted from his covenant.¹⁶⁵

§ 6485. **Principal and agent.**—Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third person, whether the agent had any written authority or not.¹⁶⁶ In an action between S. and D., a writ of restitution issued commanding the sheriff to cause D. to be removed from certain premises, and S. to have restitution of the same. The return of the writ by the sheriff showed that he “put S., by his representative M., in peaceable possession.” It was held that the possession under the writ was that of S., and not of M.; that M. was the mere agent of S., and that the presumption of the continuance of that relation was not destroyed by proofs of acts of control over the premises subsequently exercised by M. which were not inconsistent with his position as agent. After the service of the writ, and while the relation remained unchanged between S. and M., D. entered upon the premises, and an action under the forcible entry and unlawful detainer statute was thereupon commenced by and in the name of M. against D. It was held that M. could not maintain the action by reason of his want of possession.¹⁶⁷ The persons by whose direction, agency,

¹⁶³ Steinback v. Crone, 36 Cal. 303; Reay v. Cotter, 29 Cal. 168; Pico v. Cuyas, 48 Cal. 639. In addition to the summary remedy, see Cal. Civ. Code, § 793, and the remedy therein provided. See, also, Hawxhurst v. Lobbree, 38 Cal. 563.

¹⁶⁴ Hunter v. Porter, 10 Idaho, 72, 77 Pac. 434.

¹⁶⁵ Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115.

¹⁶⁶ Minturn v. Burr, 16 Cal. 107.

¹⁶⁷ Mitchell v. Davis, 20 Cal. 45.

and procurement the forcible entry is made, are liable in the action.¹⁶⁸

§ 6486. **Arrest of defendant.**—Under the California statute, if the complaint presented establishes, to the satisfaction of the judge or justice, fraud, force, or violence in the entry or detainer, and that the possession held is unlawful, he may make an order for the arrest of the defendant.¹⁶⁹

§ 6487. **Circumstances of terror.**—Where the defendant entered with a large number of men, in a hurried manner, a little after daylight, upon land in the possession of the plaintiff, although the latter had no house upon it, and the defendant's party tore down one fence and erected another, and put up a shanty hurriedly and in a rough manner, all of which was completed by eleven o'clock in the forenoon of the day on which the entry was made, and the completion of the job was celebrated by the firing of a pistol, it was held that there were sufficient "circumstances of terror" to make the entry a forcible one.¹⁷⁰

§ 6488. **Construction of statute.**—Each mode mentioned in the forcible entry and unlawful detainer act is as distinct and complete in itself as that of the expulsion of the party in possession by force, threats, or menace, after a peaceable entry. It is not intended by the statute to charge a party with responsibility for a forcible detainer, by construction, who did not in fact detain the premises.¹⁷¹ The fraudulent acts which may be alleged under the fifth section of the act¹⁷² do not constitute a cause of action, but merely go to the enhancement of damages, when a cause of action is made out under the other sections of the act.¹⁷³ If the defendant enters in good faith under claim and color of title, his entry is not unlawful within the meaning of the act.¹⁷⁴ The Code of Civil Procedure of California provides for the entire field of forcible entry and detainer, and repeals all prior statutes on that subject.¹⁷⁵

168 *Minturn v. Burr*, 20 Cal. 48.

169 Cal. Code Civ. Proc., § 1168.
See, in connection with this section,
Cal. Const., art. I, § 15.

170 *Gray v. Collins*, 42 Cal. 152.
See, also, *Ely v. Yore*, 71 Cal. 130, 11
Pac. 868; *Mason v. Powell*, 38 N. J.
L. 576; *Allen v. Tobias*, 77 Ill. 169.

171 *Brawley v. Risdon Iron Works*,
38 Cal. 676.

172 Cal. Code Civ. Proc., § 1166.

173 *Polack v. Shafer*, 46 Cal.
270.

174 *Dennis v. Wood*, 48 Cal. 361.

175 *Hemstreet v. Wassum*, 49 Cal.
273.

§ 6489. **Damages.**—The right to the rents and profits comes from the right to the possession of the premises. But if the plaintiff claims the value of the buildings destroyed as damages, the solution of the question would depend upon the amount of his interest in the building.¹⁷⁶ And damages are not awarded unless the plaintiff recovers possession of the premises in controversy.¹⁷⁷ Except where the lease expires pending litigation, and the tenant is not entitled to a restitution of the premises, he may nevertheless have judgment for damages flowing from the forcible entry and detainer.¹⁷⁸ A., in pursuance of the provisions of the "act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," entered upon unoccupied land, marked it out, so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B. It was held that in an action of forcible entry A. could recover the land from B., but without a fine or treble damages.¹⁷⁹ The complaint in an action of forcible entry need not pray for treble damages to warrant the court in trebling them.¹⁸⁰ If a complaint contains proper averments of damages sustained, and plaintiff recovers, and damages are found, either by the court or by the verdict of a jury, it is the duty of the court to treble the damages, although treble damages are not asked for in the complaint.¹⁸¹ Under the former statute, it was held that if the court refused to treble the damages, the error, if such it were, could be corrected on appeal without ordering a new trial, and that *mandamus* would not be granted.¹⁸² Where the proofs show that plaintiff was only ousted from part of the premises, he cannot recover damages for the detention of the whole.¹⁸³ The power of the county court, or its successor, in California, to treble the damages by way of penalty in actions of forcible entry results by necessary implication from its power to try *de novo*.¹⁸⁴

¹⁷⁶ Warburton v. Doble, 38 Cal. 619.

¹⁷⁷ Brawley v. Risdon Iron Works, 38 Cal. 676.

¹⁷⁸ Cutler v. Co-operative Brotherhood, 31 Wash. 680, 72 Pac. 464.

¹⁷⁹ Stark v. Barnes, 4 Cal. 412.

¹⁸⁰ Hart v. Moon, 6 Cal. 161.

¹⁸¹ Tewksbury v. O'Connell, 25 Cal. 264; Watson v. Whitney, 23 Cal. 375.

¹⁸² Early v. Mannix, 15 Cal. 149.

See Cal. Code Civ. Proc., §§ 1166, 1174.

¹⁸³ Thompson v. Smith, 28 Cal. 527.

¹⁸⁴ O'Callaghan v. Booth, 6 Cal. 63.

See Code Civ. Proc., § 1174. See further, as to damages, Giddings v. '76 Land etc. Co., 83 Cal. 96, 23 Pac. 196; Taylor v. Terry, 71 Cal. 46, 11 Pac. 813; Rimmer v. Blasingame, 94 Cal. 139, 29 Pac. 837; Lee Chuck v. Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

§ 6490. **Entry in good faith.**—If the defendant enters in good faith, under claim and color of title, his entry is not unlawful. A peaceable entry made in bad faith is an unlawful entry.¹⁸⁵ The defendant may introduce evidence of title in himself for the purpose of showing good faith in his entry, but not for the purpose of establishing or trying title. And if he does so, the plaintiff cannot introduce evidence of title in himself in rebuttal.¹⁸⁶ But he may introduce a prior deed of the grantor to another person.¹⁸⁷ A qualified pre-emptioner who enters upon public surveyed land, peaceably and in good faith, for the purpose of pre-empting, and believing that he has a right to enter, cannot be removed by this proceeding.¹⁸⁸ Defendant may show that prior to the time plaintiff acquired possession he had exercised acts of ownership over the property, as going to the question of good faith in his entry.¹⁸⁹

§ 6491. **Showing required of plaintiff or defendant upon trial.**—Actual force is not necessary, but threats, and showing an intention to resort to violence if resistance is offered, are sufficient.¹⁹⁰ The plaintiff in this action must show an actual peaceable possession in himself at the time of the entry.¹⁹¹ What is actual and what is constructive possession, is a question for the jury in many cases.¹⁹² Where the complaint avers forcible and unlawful entry, and that the defendant forcibly detained the premises so unlawfully taken, forcible entry must be proven—the averment of detainer not being stated as an independent ground of relief.¹⁹³ In such action, proof of forcible detainer does not prove forcible entry.¹⁹⁴ If the plaintiff seeks to recover on the ground of a forcible entry and detainer, and the proof shows that there was no actual force, and that he neither apprehended, nor had any ground to apprehend, any positive act of violence from the defendant, he cannot recover.¹⁹⁵ The evidence must tend to prove an entry by the defendants with strong hand, with unusual weapons, or with menace of life or limb, or they

185 *Dennis v. Wood*, 48 Cal. 363;
Shelby v. Houston, 38 Cal. 422.

186 *Dennis v. Wood*, 48 Cal. 363.

187 *Conroy v. Duane*, 45 Cal. 597.

See *Potts v. Magnes*, 17 Colo. 364, 30
Pac. 58.

188 *Townsend v. Little*, 45 Cal. 673.
But see *Randall v. Falkner*, 41 Cal.
242.

189 *Conroy v. Duane*, 45 Cal. 597.
See, also, *Bowers v. Cherokee Bob*, 45
Cal. 495.

190 *O'Callaghan v. Booth*, 6 Cal. 63.

191 *Treat v. Stuart*, 5 Cal. 113.

192 *O'Callaghan v. Booth*, 6 Cal. 63.

193 *Preston v. Kehoe*, 15 Cal. 315.

194 *Id.*

195 *Thompson v. Smith*, 28 Cal. 527.

cannot be convicted of a forcible entry.¹⁹⁶ On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer.¹⁹⁷ The plaintiff must show that he was "peaceably in the actual possession at the time of the entry," and peaceable possession will not be presumed from actual possession.¹⁹⁸

§ 6492. **Damages.**—The claim for damages is only as an incident to the right to possession, and if such right does not exist, any damages must be asserted in a civil action.¹⁹⁹ The plaintiff cannot prove damages sustained by the defendants holding over in respect to their property immediately adjoining the demised premises, respecting which the relation of landlord and tenant was not subsisting.²⁰⁰

§ 6493. **Demand of rent and for delivery of possession.**—If a tenant holds over after rent has become due and remains unpaid for the space of three days, a demand by the landlord of the payment of rent and delivery of possession, both made at the same time, will enable him to maintain an action for an unlawful holding over. It is not necessary to demand rent, and wait three days, and then demand possession.²⁰¹ The demand should now be made in the alternative, for the payment of the rent, stating the amount, or the possession of the property.²⁰² It is not necessary to allege in the complaint the manner in which the notice to pay the rent or to surrender possession was served, and, if the fact of the service is distinctly alleged, this allegation will be construed, as against a general demurrer, to include everything necessary to constitute a sufficient service.²⁰³ A waiver of the demand will never be implied for the purpose of making

¹⁹⁶ *McMinn v. Bliss*, 31 Cal. 122.

¹⁹⁷ Cal. Code Civ. Proc., § 1172.

¹⁹⁸ *Warburton v. Doble*, 38 Cal. 619. See, also, Cal. Code Civ. Proc., § 1172.

¹⁹⁹ *Stevens v. Jones*, 40 Wash. 484, 82 Pac. 754; *Tyler v. McKenzie*, 43 Colo. 233, 95 Pac. 943.

²⁰⁰ *Kower v. Gluck*, 33 Cal. 401. As

to damages, consult Cal. Code Civ. Proc., § 1174.

²⁰¹ *Brummagim v. Spencer*, 29 Cal. 661.

²⁰² Cal. Code Civ. Proc., § 1161. See *Silva v. Campbell*, 84 Cal. 420, 24 Pac. 316.

²⁰³ *Knowles v. Murphy*, 107 Cal. 107, 40 Pac. 111.

a forfeiture. A forfeiture cannot take place by consent, and it is not favored by the rules of law.²⁰⁴

But if the tenant continues in possession after the term for which it is let to him without permission of the landlord, the three days' notice required to terminate a tenancy is not required; it is quite sufficient if the lessee is informed in writing and verbally that he cannot continue in possession. The notice may be signed by an agent for the landlord.²⁰⁵

§ 6494. **Entry, how made.**—A landlord has no right of entry for breach of covenant in a lease, and to forcibly eject the tenant, the lease reserving no such right of entry;²⁰⁶ and even if he retains the right to retake possession, the lessor is not justified in making a forcible entry thereon.²⁰⁷ If the landlord does so enter and eject the tenant, the tenant may recover damages in trespass for the vegetables and grapevines growing on the land, and planted by the tenant for sale, he not being permitted to enter and gather them.²⁰⁸

§ 6495. **Notice to quit.**—In Oklahoma, plaintiff must at least three days before bringing action of forcible entry and unlawful detainer give the tenant notice in writing to quit the premises.²⁰⁹ The notice may be served by one authorized by plaintiff.²¹⁰ In California, such notice must be served upon a tenant of real property for a term less than life before he is made guilty of unlawful detainer.²¹¹ And though the covenant broken cannot be performed, and the landlord need not demand performance thereof, it is, however, necessary to give notice of demand for possession of the premises before starting suit for unlawful detainer.²¹² A mistake in the notice does not invalidate it if the one notified actually knows what is meant thereby.²¹³ A reservation in a

²⁰⁴ *Gaskill v. Trainer*, 3 Cal. 334. As to demand for and refusal to surrender possession, see *Rimmer v. Blasingame*, 94 Cal. 139, 29 Pac. 857.

²⁰⁵ *Earl Orchard Co. v Fava*, 138 Cal. 76, 70 Pac. 1073; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662.

²⁰⁶ *Fox v. Brissac*, 15 Cal. 223.

²⁰⁷ *Kerr v. O'Keefe*, 138 Cal. 415, 71 Pac. 447.

²⁰⁸ *Id.* Compare *Kelly v. Teague*,

63 Cal. 68; *Smith v. Hill*, 63 Cal. 51. ²⁰⁹ *Smith v. Finger*, 15 Okla. 120, 79 Pac. 759.

²¹⁰ *Burns v. Noell*, 12 Okla. 133, 69 Pac. 1076.

²¹¹ Cal. Code Civ. Proc., § 1161; *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185.

²¹² *Schnittger v. Rose*, 139 Cal. 656, 73 Pac. 449.

²¹³ *Lacrabere v. Wise (Cal.)*, 71 Pac. 175.

lease of the right to terminate the tenancy on service of a thirty-day notice upon breach of a covenant does not preclude the use of the remedy under the statute.²¹⁴ By the terms of an award which was decisive between a landlord and his tenant, where the latter was to leave the premises on the 9th, it was held that the plaintiff had no right to give notice to quit until the 10th, after which the plaintiff had six ²¹⁵ days to remove, wherefore the action commenced on the 10th was premature.²¹⁶ In an action where the evidence showed a tenancy from year to year, plaintiff must show that he has terminated the tenancy by notice to quit, and if the tenant be permitted to hold over without such notice a new term is created, and he cannot be legally dispossessed.²¹⁷ When notice is served on the original lessee, the notice binds the under-tenants who acquire possession from the tenant after its service;²¹⁸ and they are liable to the landlord for double the monthly value of the premises.²¹⁹ Where defendant held as tenant under J. S. in his lifetime, under whom, as heir at law, the plaintiff claimed as landlord, but the defendant refused to recognize him as such, it was held, in an action for use and occupation, that this refusal terminated the tenancy, and overweighed the presumption of a contract between defendant and plaintiff.²²⁰ The denial of title and the relation of tenant makes defendant a trespasser, and not entitled to notice to quit before suit in ejectment, and no special demand for payment of rent is necessary to make a forfeiture, as defendant could not deny title and yet claim the benefit of holding in subordination to it.²²¹

§ 6496. **Notice and demand.**—A notice from which it is impossible to determine how much the lessor claims to be due, or which sets out all of the numerous covenants of the lease and alleges that all have been broken, and does not point out any particular act which lessee could perform within a given time, is insufficient to entitle lessor to maintain forcible entry and detainer.²²² Proof

²¹⁴ Hunter v. Porter, 10 Idaho, 72, 77 Pac. 434.

²¹⁵ Now three, under Cal. Code Civ. Proc., § 1161.

²¹⁶ Ray v. Armstrong, 4 Cal. 208.

²¹⁷ Sullivan v. Cary, 17 Cal. 80. See Cal. Civ. Code, § 1945.

²¹⁸ Schilling v. Holmes, 23 Cal. 227.

²¹⁹ Id. See Cal. Code Civ. Proc., § 1164.

²²⁰ Sampson v. Schaffer, 3 Cal. 107.

²²¹ Smith v. Shaw, 16 Cal. 88. For the mode of serving notice to terminate tenancy at will, and all notices under the provisions of section 1161 of the California Code of Civil Procedure, see same code, § 1162.

²²² Byrket v. Gardner, 35 Wash. 668, 77 Pac. 1048.

of service of the notice cannot be made by affidavit, but only by testimony of the one making service, given as a witness in the case.²²³ Plaintiff must affirmatively prove the three days' notice and demand for rent or possession.²²⁴

§ 6497. **Rents and profits.**—The plaintiff in an action in unlawful detainer can only recover the rents which accrue after the possession of the tenant becomes unlawful; the rents accruing prior to that time are not recoverable.²²⁵ Rents and profits may be awarded as damages without the value thereof being stated in the complaint.²²⁶ But if the action be for default in payment of rent, the amount must be stated.²²⁷ The plaintiff is entitled to recover the monthly rents and profits during the time of the unlawful detainer, without regard to the nature or the extent of the right or title by which he held the possession.²²⁸

§ 6498. **Restitution, writ of.**—Where a sheriff refuses to execute the writ on the ground that the premises are in possession of persons not parties to the suit, but who claim to hold under one of the defendants, the court will award a peremptory *mandamus* against the sheriff to compel him to execute the writ.²²⁹ Where, in forcible entry and detainer, plaintiff had judgment in the justice's court, and was placed in possession of the land by a writ of restitution, and subsequently defendant gave bond and appealed to the county court, where, after trial, there was a verdict for defendant, it was held that the county court had power, after reversing the judgment of the justice, to award defendant a writ of restitution; that such a writ was necessary to perfect the jurisdiction of that court over the subject.²³⁰ In an early California case,²³¹ it was held that a party succeeding to the original wrongful possession is not liable in action of forcible entry and detainer in the same manner as his predecessor, because defendant came in without any new title, and merely succeeded

²²³ *Lacrabere v. Wise*, 141 Cal. 554, 75 Pac. 185; *Smith v. Travel*, 20 Okla. 512, 94 Pac. 529.

²²⁴ *Gardner v. Kime*, 20 Okla. 784, 95 Pac. 242; *Wilson's Annot. Rev. Stats.* 1903, § 5089.

²²⁵ *Howard v. Valentine*, 20 Cal. 282.

²²⁶ *Holmes v. Horber*, 21 Cal. 55.

²²⁷ Cal. Code Civ. Proc., § 1166.

²²⁸ *Roff v. Duane*, 27 Cal. 568.

²²⁹ *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711. As to writ of restitution—stay of proceedings pending appeal, see *Lee Chuck v. Quan Wo Chong Co.*, 81 Cal. 222, 15 Am. St. Rep. 50, 22 Pac. 594.

²³⁰ *Kennedy v. Hamer*, 19 Cal. 375.

²³¹ *Stark v. Barnes*, 4 Cal. 412.

to the claim, and consummated the trespass of the original trespasser.

§ 6499. **Rent.**—There is no error in finding the amount of rent due at the time of the trial.²³² If the tenant is forcibly evicted by the landlord from a substantial part of the demised premises, but continues to occupy the remaining portion under the lease, he cannot be proceeded against in unlawful detainer for the non-payment of rent while the eviction lasts.²³³

§ 6500. **Reversal of judgment.**—If plaintiff recovers judgment and is placed in possession of the land, and defendant appeals, and the judgment is reversed, the latter is entitled to be restored to the possession, even if the plaintiff has leased the premises.²³⁴

§ 6501. **Tenant at will.**—A tenant at will is one who holds rent-free by permission of the owner, or where he enters under an agreement to purchase, or for a lease, but has not paid rent. The great criterion by which to distinguish between tenancies from year to year and at will is the payment or reservation of rent.²³⁵ A tenancy at will cannot exist without express grant or contract, and where it does exist, the tenant is entitled to reasonable notice of his landlord's intention to terminate the estate before an action can be maintained against him for the possession.²³⁶ A grantor who remains in possession does so as tenant at will of the grantee.²³⁷ Notice of not less than one month is required to terminate it.²³⁸

§ 6502. **Tenancy for years.**—A tenancy for the specified period of one month is a tenancy for years, and not a tenancy from year to year or month to month; but if a tenant for the specified period of one month holds over with the consent of his landlord, he thereby becomes a tenant from month to month.²³⁹ An estate for years is one that is founded upon contract, express or implied, which is not determinable at the will of either party, but endures for a time certain.²⁴⁰

²³² *Mason v. Wolff*, 40 Cal. 246.

²³³ *Skaggs v. Emerson*, 50 Cal. 3.

²³⁴ *Pico v. Cuyas*, 48 Cal. 639.

²³⁵ *Bouv. Law Dict.*

²³⁶ *Blum v. Robertson*, 24 Cal. 128.

²³⁷ *Brooks v. Hyde*, 37 Cal. 366.

²³⁸ *Cal. Civ. Code*, § 789; *Groome*
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v. Almstead, 101 Cal. 428, 35 Pac. 1021.

²³⁹ *Stoppelkamp v. Mangeot*, 42 Cal. 317; *Utah Loan etc. Co. v. Garbutt*, 6 Utah, 342, 23 Pac. 758; *Hurd v. Whitsett*, 4 Colo. 77.

²⁴⁰ 1 *Washburn on Real Property*,

§ 6503. **Term, expiration of.**—If the tenant takes a receipt from his landlord, specifying the amount of rent paid and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such cases. When the lessee holds over, and the landlord receives rents after the expiration of the term, a new tenancy arises by implication, subject to the covenants and conditions of the original lease, but the new term is not necessarily for one year.²⁴¹ If the lessee sublets the leased premises for the entire term of his lease from the lessor, no right of entry remains in him upon the expiration of the term. The right of entry is in him who holds the reversion.²⁴² If a tenant for one year or more before the expiration of this term procures the landlord's receipt for one month's rent, commencing at the expiration of the term, a new tenancy of one year is not thereby created.²⁴³ The tenancy is terminated by an eviction; and a subsequent taking and holding by the tenant under a lease from the evictor is not in subordination to the title of the original lessor.²⁴⁴

§ 6504. **Tenant, liability, rights, and duties of.**—An under-tenant who takes a lease and receives possession from the tenant becomes the tenant of the landlord, subject to all the duties and liabilities of a tenant to the landlord. The tenant is liable to pay rent until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord's, or by some agency of the landlord. If the tenant is evicted by a wrongdoer, the landlord is not bound to indemnify him.²⁴⁵ If a tenant denies the relation of landlord and tenant, and refuses to pay rent, he cannot afterwards revive that relation by offering to pay rent.²⁴⁶ One of the most important duties of a tenant is to peaceably and quietly surrender the premises to the landlord as

p. 43 (44th ed.); *Brown v. Bragg*, 22 Ind. 122.

²⁴¹ *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560.

²⁴² *Id.* See *Bailey v. Richardson*, 66 Cal. 416, 5 Pac. 910.

²⁴³ *Id.* See Cal. Civ. Code, §§ 1943-1947.

²⁴⁴ *Steinback v. Krone*, 36 Cal. 303; citing as authority *Wheelock v. Warschauer*, 21 Cal. 316, 34 Cal. 265. As to what constitutes unlawful de-

tainer, see Cal. Code Civ. Proc., § 1161. As to requisites of a complaint by a landlord to recover possession of demised premises for non-payment of rent, see *Mayor of New York v. Campbell*, 18 Barb. 156. See, also, *McKissick v. Ashby*, 98 Cal. 422, 33 Pac. 729.

²⁴⁵ *Schilling v. Holmes*, 23 Cal. 227.

²⁴⁶ *Conner v. Jones*, 28 Cal. 60. But see Cal. Code Civ. Proc., §§ 1174, 1179.

soon as the tenancy has expired.²⁴⁷ If a stranger intrudes on the premises and takes possession, either forcibly or otherwise, it is the duty of the tenant to take proper legal proceedings to regain the possession, so that he may surrender the same to the landlord.²⁴⁸

§ 6505. **Easement.**—In forcible entry upon land an answer that the defendants entered as the servants of a specified railroad company, which had legally appropriated the injured property as the line of its road, would justify the entry and bar the suit.²⁴⁹

§ 6506. **Defense—Entry under law.**—The defendant may show that the lands described in the complaint are public lands of the United States, and that he entered on a portion thereof, specifically describing the part entered on, under and by virtue of an act of the legislature prescribing the mode of maintaining possessory actions on public lands, and that the lands so entered on are lands to which the plaintiff has no right of property or possession, and no title to or interest therein, etc.;²⁵⁰ or that he entered by permission, though erroneously given.²⁵¹

§ 6507. **Defense—Eviction.**—In an action by a landlord against his tenant, under the thirteenth section of the forcible entry and unlawful detainer act, the latter may defend by showing an eviction under an adverse title in a judicial proceeding, of which proper notice was given to the landlord. Such a defense does not involve any question of title, the effect of an eviction being to dispossess the landlord as well as the tenant, and to relieve the latter from the obligation of his tenancy. The rule which estops a tenant from disputing his landlord's title does not prevent him from showing that the tenancy has been determined; and he may treat an eviction with notice, by one having an adverse title, as a termination of the tenancy, and thus resist any claim by the landlord, either for rent or possession. The notice by a tenant to his landlord of proceedings to evict him may be oral.²⁵² An eviction of a tenant by title, both legal and paramount to that of the landlord, must of necessity determine the tenancy, and when the

²⁴⁷ Schilling v. Holmes, 23 Cal. 227.

²⁴⁸ Id. See Cal. Civ. Code, § 1949.

²⁴⁹ Green v. Boody, 21 Ind. 10.

²⁵⁰ Buel v. Frazier, 38 Cal. 693.

²⁵¹ Jones v. Seawall, 13 Okla. 711.

76 Pac. 154.

²⁵² Wheelock v. Warschauer, 21 Cal.

309.

title of the landlord is set up in defense of the action, and the landlord appears and defends the action at the request of the tenant, and in his name, he cannot be heard to say in a contest with the tenant that the tenant was not evicted by paramount title.²⁵³ Abandonment by plaintiff after defendant went upon the land is no defense.²⁵⁴

§ 6508. **General denial.**—Where in a case in a justice's court the complaint verified alleges a demand in writing for possession, and the answer, verified, instead of specifically denying the allegation, denies generally "each and every allegation" in the complaint, it was held that this general denial put plaintiff on proof of demand, and of everything necessary to maintain the action.²⁵⁵ A general denial is no longer sufficient.²⁵⁶ But under the old practice, in an action of forcible entry and detainer in the justice court, all matters of legal excuse, justification, or avoidance could be given in evidence by the defendant, under a general denial of the allegations of the complaint.²⁵⁷ In Oklahoma, defendant is not required to file any pleading.²⁵⁸

§ 6509. **Insufficient defense.**—Proof of prior possession of the premises in controversy does not constitute a defense to this action.²⁵⁹ The denial that the plaintiff owned the buildings on the premises in controversy does not raise an issue that can be tried in an action of forcible entry and detainer. So new matter pleaded by defendant in respect to the lease of the premises to the plaintiff, its expiration, and the subsequent forcible and fraudulent entry and detainer by the plaintiff, his attempt to place others in possession, and the claim of the defendant against the plaintiff for the rent of the premises, do not constitute a defense to the action. A set-off is not admissible in actions of this class, and it makes no difference whether it is a demand for money or a previous forcible entry of the plaintiff.²⁶⁰

§ 6510. **Sufficient defense.**—If the answer in forcible detainer expressly denies the allegation of a paragraph of the complaint

²⁵³ *Wheelock v. Warschauer*, 34 Cal. 265.

²⁵⁴ *Spellman v. Rhode*, 33 Mont. 21, 81 Pac. 395.

²⁵⁵ *Sullivan v. Cary*, 17 Cal. 80.

²⁵⁶ *More v. Del Valle*, 28 Cal. 172.

²⁵⁷ *Watson v. Whitney*, 23 Cal. 375. But see *More v. Del Valle*, 28 Cal. 172.

²⁵⁸ *Smith v. Finger*, 15 Okla. 120, 79 Pac. 759.

²⁵⁹ *Brown v. Perry*, 39 Cal. 23.

²⁶⁰ *Warburton v. Doble*, 38 Cal.

which charged a forcible detainer, and denies that plaintiff is entitled to possession of the land, or has any right thereto, plaintiff cannot have judgment on the pleadings, since such an answer raises an issue.²⁶¹ If plaintiff's title and right of possession is specially denied, failure to deny the abstract appended to the complaint is not an admission of the correctness of such abstract.²⁶²

§ 6511. **Leave and license.**—An agreement made by the landlord with the tenant, after the expiration of the lease, that the tenant shall have possession of the premises one year longer, paying therefor a stipulated rent, to be paid if the land is included in a certain survey, vests in the tenant the present right to possess the land until the expiration of the agreement, and, if pleaded is admissible in evidence as a defense to an action for holding over, brought before the expiration of the time specified in the agreement.²⁶³ It seems that evidence showing the acquiescence of the plaintiff in the defendant's acts is admissible under an answer denying the allegation that the acts were done without consent of the plaintiff, and by force, etc.; but if not, the objection must be taken at the trial, and is not available on appeal.²⁶⁴

§ 6512. **Defense—Right of possession.**—If the party guilty of a forcible entry has any title or right of possession, his title or right of possession cannot be tried in an action of forcible entry and detainer. He must first deliver up the possession forcibly acquired, and then he may litigate his title or right to possession in a proper action.²⁶⁵ That defendant entered in good faith is immaterial in unlawful detainer.²⁶⁶ An injunction suit and order against defendant may be pleaded in bar of an action of forcible entry and detainer.²⁶⁷ If D. and H. are in peaceable possession of a lot of land, and S. and S., accompanied by others, their employees, forcibly evict them therefrom and take possession,

619; *Bonnell v. Gill*, 41 Colo. 59, 92 Pac. 13.

²⁶¹ *Kennedy v. Dickie*, 27 Mont. 70, 69 Pac. 672.

²⁶² *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

²⁶³ *Uridias v. Morrell*, 25 Cal. 35.

²⁶⁴ *Rowan v. Kelsey*, 2 Keyes, 594.

²⁶⁵ *Mitchell v. Davis*, 23 Cal. 381; *Hackney v. McKee*, 12 Okla. 401, 75 Pac. 535; *McQuiston v. Walton*, 12 Okla. 130, 69 Pac. 1048; *Brown v. Hartshorn*, 12 Okla. 121, 69 Pac. 1049.

²⁶⁶ *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556.

²⁶⁷ *Lowry v. Mitchell*, 14 Okla. 241, 78 Pac. 379.

and then lease the lot to R., who enters into peaceable possession, and five days afterwards D. and H., with others, forcibly dispossess R. and take possession, and R. brings an action for forcible entry against them, D. and H. cannot introduce evidence of their prior eviction by S. and S. in defense.²⁶⁸ The person whose occupancy of land is through his servants, and who has never been in possession, cannot maintain an action for an unlawful entry made during his temporary absence, and a refusal to surrender possession.²⁶⁹ In an action for unlawful detainer against a tenant holding over under a written lease, after the expiration of the term, without the consent of the lessor, evidence of a verbal renewal of the written lease is inadmissible, unless the same be pleaded.²⁷⁰

§ 6513. **Confession and avoidance.**—An answer denying ownership and right of plaintiff, and alleging the patent through which plaintiff's grantors claimed to be void, and claiming the land by virtue of homestead entry and occupation, is not a confession and avoidance, but a denial of plaintiff's title, which places the burden of proof on plaintiff.²⁷¹ Defendant may set up an injunction restraining plaintiff from interfering with defendant's possession.²⁷² But a tenant cannot enjoin his landlord from terminating the tenancy and bringing suit in unlawful detainer because of an agreement of the landlord to buy the furniture. His remedy is by a separate action for damages at law.²⁷³ Defendant may defend upon the grounds of a fraudulent transaction in passing the deed and lease, without first rescinding or asking to have the deed set aside;²⁷⁴ but generally an equitable defense cannot be interposed.²⁷⁵

In Idaho, the summary proceeding for obtaining possession of real property, and an action thereunder for unlawful detainer, can be met only by a defense, and is not subject to counterclaim or cross-complaint.²⁷⁶ Defendant may plead an affirmative de-

²⁶⁸ *Roff v. Duane*, 27 Cal. 568.

²⁶⁹ *Hammel v. Zobelein*, 51 Cal. 532.

²⁷⁰ *Perine v. Teague*, 66 Cal. 446, 6 Pac. 84.

²⁷¹ *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

²⁷² *Lowry v. Mitchell*, 14 Okla. 241, 78 Pac. 379.

²⁷³ *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808.

²⁷⁴ *Simon Newmnan Co. v. Lassing*, 141 Cal. 174, 74 Pac. 761.

²⁷⁵ *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97.

²⁷⁶ *Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

fense, but not a set-off, counterclaim, or equitable defense.²⁷⁷ Possession cannot be held until improvements are appraised and paid for, and such a defense cannot be made.²⁷⁸

§ 6514. **Abstract of title.**—Plaintiff should embody in his complaint an abstract of his title;²⁷⁹ and if he does not, defendant is not required to answer affirmatively upon the subject of title.²⁸⁰ If plaintiff's title and right of possession are specially denied, the abstract is not admitted by failure to mention it in the answer.²⁸¹

§ 6515. **Estoppel.**—Defendant in forcible entry and unlawful detainer, brought before a justice of the peace, not being able to set up his equitable action for specific performance to enforce a verbal lease, is therefore not estopped by a judgment in said court from bringing a subsequent equitable action upon the oral agreement.²⁸² A judgment in unlawful detainer against a vendee of land does not estop a separate suit to enforce performance of the contract.²⁸³

§ 6516. **Title terminated.**—A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of fact or fraud.²⁸⁴ If a tenant is evicted by his landlord from a substantial part of the premises, but still continues to occupy the remainder under the lease, the landlord cannot, under the unlawful detainer act, recover possession from the tenant by reason of non-payment of rent while the eviction continues.²⁸⁵ The time during which the tenant was to occupy the land must have expired before the demand is made for the possession. The fact that the agreement under which the defendant occupies is a verbal one, and that by its terms it was to continue two years, does not change the rule.²⁸⁶ A partnership between the lessor and lessee in the occupation of the leased property may be proved as a defense to an action by the lessor

277 *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808.

278 *Howe v. Parker*, 18 Okla. 282, 90 Pac. 15.

279 Wash. Bal. Codes, § 5550.

280 *McGrew v. Lamb*, 31 Wash. 485, 72 Pac. 100.

281 *Roberts v. Center*, 26 Wash. 435, 67 Pac. 151.

282 *McMahon v. Whelan*, 44 Or. 402, 75 Pac. 715; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97.

283 *Id.*

284 *McDevitt v. Sullivan*, 8 Cal. 592; *Tewksbury v. Magraff*, 33 Cal. 237.

285 *Skaggs v. Emerson*, 50 Cal. 3.

286 *Rogers v. Hackett*, 49 Cal. 121.

to recover possession.²⁸⁷ A tenant having assigned his lease and possession is not subject to an action for forcible or unlawful detainer.²⁸⁸

§ 6517. **Claim to and possession of.**—If a complaint in an action to recover judgment for taxes avers that the tax is an assessment of defendants' "claim to and possession of" lands, an answer setting up as new matter that the lands are public lands of the United States contains no defense.²⁸⁹ Quiet possession of defendant for the term of one year is a good defense in Montana.²⁹⁰

§ 6518. **The judgment.**—Judgment for the plaintiff shall be entered for the restitution of the premises; and if the proceedings be for an unlawful detainer after neglect or failure to perform the covenants of a lease, or failure to pay rent, the judgment shall declare the forfeiture of such lease. If the lease or agreement has not by its terms expired, and the only default claimed is failure to pay rent, execution will not issue on the judgment for five days, in which time the tenant, or any subtenant, or any mortgagee of the term, may pay into court, for the landlord, the rent, interest, and damages and costs, which payment satisfies the judgment and restores the tenant to his estate. In all other cases the judgment may be enforced immediately. If the judgment is for other breaches of covenants besides payment of rent, a subsequent order restoring the tenant on his payment of the rent and damages is void.²⁹¹ In Washington, only double damages are allowed, besides the rent found due.²⁹² The jury or the court shall also assess the damages occasioned to plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on trial, and find the amount of any rent due. The court may, at its discretion, enter judgment for the amount of the damages and rent found due, or for three times the amount so found.²⁹³ It is error to allow a greater

²⁸⁷ *Pico v. Cuyas*, 47 Cal. 174.

²⁸⁸ *Ben Lomond Wine Co. v. Sladky*, 141 Cal. 619, 75 Pac. 332.

²⁸⁹ *People v. Frisbie*, 31 Cal. 146.

²⁹⁰ *Kennedy v. Dickie*, 27 Mont. 70, 69 Pac. 672.

²⁹¹ Cal. Code Civ. Proc., § 1174; *Bateman v. Superior Court*, 139 Cal.

140, 72 Pac. 922; *Idaho Rev. Codes*, §§ 5093, 5106; *Hunter v. Porter*, 10 Idaho, 72, 77 Pac. 434.

²⁹² Wash. Bal. Codes, § 5542; *Bond v. Chapman*, 34 Wash. 606, 76 Pac. 97.

²⁹³ Cal. Code Civ. Proc., § 1174; *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440.

sum to vendor in a default judgment against vendee than the sum asked for in the complaint.²⁹⁴ A judgment in forcible entry and detainer against a vendee of land does not estop him from bringing a separate suit to enforce performance of the contract.²⁹⁵

There is no impropriety in designating rent due as damages, as every person who suffers detriment from the unlawful act of another may recover compensation therefor in money which is called damages.²⁹⁶ Rent as damages may be allowed for the time after action is commenced.²⁹⁷ The court has authority, under a complaint praying for one month's rent, to determine from the evidence the rent due at the time of the trial, and render judgment therefor.²⁹⁸ A judgment for double damages alleged in the complaint of unlawful detainer, entered by the court on defendant's default, without hearing any evidence, is unauthorized by the Washington statute.²⁹⁹

§ 6519. Execution stayed for five days.—If forfeiture is solely on account of non-payment of rent, the judgment must be satisfied and the tenant restored on payment into court of the rent, with interest and costs, within the five days during which execution is stayed; and this though the judgment itself be for treble the rent found due.³⁰⁰

§ 6520. Appeal.—An order quashing the writ of restitution issued in unlawful detainer is reviewable on appeal from the final judgment.³⁰¹ In Utah, an appeal from judgment of the justice's court in forcible entry and unlawful detainer may be taken within ten days; and in making such appeal an undertaking must be filed.³⁰² In Oregon, the undertaking must guarantee payment of twice the rental value of the premises, should judgment be affirmed.³⁰³

²⁹⁴ *Ruth v. Smith*, 29 Colo. 154, 68 Pac. 278.

²⁹⁵ *McMahon v. Whelan*, 44 Or. 402, 75 Pac. 715.

²⁹⁶ Cal. Civ. Code, § 3281; *Keyes v. Moy Jin Mun*, 136 Cal. 129, 68 Pac. 476.

²⁹⁷ Cal. Civ. Code, § 3283.

²⁹⁸ *Nolan v. Hentig*, 138 Cal. 281, 71 Pac. 440. Contra, see *State v. Pittenger*, 37 Wash. 384, 79 Pac. 942.

²⁹⁹ *Ferguson v. Hoshi*, 25 Wash. 664, 66 Pac. 105; Wash. Bal. Codes, § 5090, subd. 2.

³⁰⁰ Cal. Code Civ. Proc., § 1174; *Owen v. Herzihoff*, 2 Cal. App. 622, 84 Pac. 274.

³⁰¹ *State v. Superior Court*, 49 Wash. 203, 94 Pac. 924.

³⁰² *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167.

³⁰³ *Wolfer v. Hurst*, 50 Or. 218, 91 Pac. 366.

FORMS—FORCIBLE ENTRY AND DETAINER.

§ 6521. Complaint—For forcible entry.

Form No. 1752.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned he was in the peaceable and actual possession of all that certain piece or parcel of land [describe the premises], and of the dwelling-house, barns, and sheds thereon.

II. That on the . . . day of . . . , 19.., and while the plaintiff was so in possession of said land and premises, the defendant, with violence and a strong hand, and by force, entered thereon, and in a forcible manner ejected said plaintiff, and put him out of said lands and tenements, and broke the doors and windows of said house, and tore down and destroyed said barn and sheds [set out the facts showing a forcible entry], contrary to the form of the statute, and to the damage of the plaintiff in the sum of . . . dollars.

[Or, if the action is brought under the second clause of section 1159 of the California Code of Civil Procedure, or other similar statute, allege in place of the foregoing, as follows:

II. That afterward, to-wit, on the . . . day of . . . , 19.., and while the plaintiff was so in possession of said land and premises, the defendant peaceably entered thereon, and afterwards, and on the same day, forcibly turned out and expelled the plaintiff therefrom [or if the eviction was by threats, and menacing conduct, state the facts in regard thereto], contrary to the form of the statute, and to the damage of the plaintiff in the sum of . . . dollars.]

III. That the said defendant unlawfully withholds and keeps possession of said land and premises, and has so held and kept possession of the same at all times since the said . . . day of . . . , 19..

IV. That in consequence of said acts the plaintiff has been deprived of the rents, issues, and profits of said land and premises, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT, AND VERIFICATION.]

§ 6522. Complaint—For forcible entry and forcible detainer.

Form No. 1753.

[TITLE.]

The plaintiff complains, and alleges:

First. For a first cause of action:

I and II. [As in preceding form.]

Second. For a second cause of action:

I. That the said defendant, by force and with a strong hand [or by menaces and threats of violence, stating the facts], unlawfully holds and keeps possession of said land and premises in the first cause of action mentioned, and has so held and kept possession of the same at all times since the said . . . day of . . . , 19.. , contrary to the form of the statute.

II. That the plaintiff was on the day last aforesaid, and still is, entitled to the possession of said lands and premises.

III. That in consequence of said acts, the plaintiff has been deprived of the rents, issues, and profits of said lands and premises, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT, AND VERIFICATION.]

§ 6523. Complaint—For forcible detainer, under subdivision 1 of section 1160 of the California Code of Civil Procedure.

Form No. 1754.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , he was well entitled to the possession of the following described premises [describe the same] and on that day the defendant peaceably [or otherwise, according to the fact], but without right so to do, entered and took possession of the same, and from that day hitherto has kept, and still holds and keeps, possession of the same unlawfully and by force [or by menaces and threats of violence, stating the same], contrary to the form of the statute in such case made and provided.

II. [If any special injury has been done the property by the defendant, allege the same, and state amount of damages.]

III. That in consequence of the said unlawful acts of the said defendant, the plaintiff has been deprived of the rents, issues, and profits of said land and premises ever since said . . . day of . . . , 19.. , to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT, AND VERIFICATION.]

§ 6524. Complaint—For forcible detainer, under the second clause of section 1160 of the California Code of Civil Procedure.

Form No. 1755.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, and for five days previous thereto, he was in the peaceable and actual possession and occupation, and entitled to the possession of all that certain piece or parcel of land [describe the premises], and of the dwelling-house, barns, and sheds thereon.

II. That on the . . . day of . . . , 19.., in the night-time [or, during the absence of the plaintiff], the defendant unlawfully entered upon said lands and tenements, and took possession of the same.

III. That on the . . . day of . . . , 19.., at . . . , the plaintiff made a demand in writing upon the defendant, to deliver up to the plaintiff the possession of said land and premises held as aforesaid; but the defendant neglected and refused for the period of five days after such demand, and at all times since, to surrender the possession of the same to the plaintiff, and still holds and continues in possession of said premises, against the form of the statute.

IV. That in consequence of said acts, the plaintiff has been deprived of the rents, issues, and profits of said land and premises, to his damage in the sum of . . . dollars, and has sustained damage for waste and injury committed thereon in the sum of . . . dollars.

[DEMAND OF JUDGMENT, AND VERIFICATION.]

§ 6525. Complaint—Unlawful detainer—Holding over after rent due.

Form No. 1756.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . . , 19.., the said plaintiff by a . . . lease, made on or about the said day at . . . , county of . . . , leased, demised, and let to the said defendant, of the said . . . , county of . . . , the premises situate, lying, and being in the county of . . . , state of . . . , and described as follows, to-wit [describe premises], to have and to hold the said premises, to the defendant, for the term of . . . months thence next ensuing, at the monthly rent of . . . dollars, payable in advance.

II. That by virtue of said lease the defendant went into the

possession and occupation of the demised premises, and still continues to hold and occupy the same.

III. That according to the terms of said lease there became due, on the . . . day of . . . , 19.., for the rent of said premises, the sum of . . . dollars.

IV. That on the . . . day of . . . , 19.., and within one year after said rent became due as aforesaid, by the terms of said lease, demand in writing was made by the plaintiff of . . . [the lessee], for payment thereof, or that he surrender the possession of said premises held as aforesaid, to the plaintiff, within three days, but said defendant neglected and refused, for the space of three days after said demand as aforesaid, to quit the possession of the said demised premises, or to pay the rent thereof due and unpaid as aforesaid, and the same still remains due and unpaid; that a copy of said demand is hereunto annexed and made a part of this complaint.

V. That said defendant unlawfully holds over and continues in the possession of the said premises, after default in the payment of the rent as aforesaid, and without the permission of the plaintiff; by reason whereof the plaintiff has sustained damages in the sum of . . . dollars.

Wherefore, the said plaintiff prays judgment:

1. For the restitution of said premises.
2. For the sum of . . . dollars, damages for waste and injury, and for the detention of said premises.
3. For the sum of . . . dollars, rent due as aforesaid.
4. That said damages and rent money may be trebled.
5. For the costs of this action.

§ 6526. Complaint.—For holding over after expiration of term.

Form No. 1757.

[TITLE.]

The plaintiff complains, and alleges:

I. That on or about the . . . day of . . . , 19.., said plaintiff, by a . . . lease made on or about the said day, at the . . . , county of . . . , leased, demised, and let to the said defendant, of . . . , county of . . . , the premises situate, lying, and being in the . . . , county of . . . , state of . . . , and described as follows, to-wit [describe property], to have and to hold the said premises, to the defendant, for the term of . . . years from the . . . day of . . . , 19.., at the yearly rent of . . . dollars, payable . . . in advance.

II. That by virtue of said lease, said defendant went into possession of said premises, and he and others under him still continue to hold and occupy the same.

III. That the term for which said premises were demised as aforesaid has terminated, and that the said defendant holds over and continues in possession of the said demised premises, without the permission of the said plaintiff, and contrary to the terms of said lease.

IV. That the said plaintiff since the expiration of the term for which said premises were demised as aforesaid, to-wit, on the . . . day of . . . , 19.., made demand in writing of the said defendant to deliver up and surrender to him the possession of said premises.

V. That more than three days have elapsed since the making of such demand, and the defendant has refused and neglected, for the space of three days after such demand, to quit the possession of said demised premises, and still does refuse, contrary to the form of the statute in such case made and provided.

VI. That the monthly value of the rents and profits of the said premises is the sum of . . . dollars.

Wherefore, the said plaintiff prays judgment:

1. For the restitution of the said premises, and for damages for the rents and profits of said premises.

2. That such damages may be trebled as damages for the occupation and unlawful detention and holding over of the same, amounting to the sum of . . . dollars per month, and for the costs of this action.

§ 6527. Answer—For forcible entry and detainer.

Form No. 1758.

[TITLE.]

The defendant answers to the complaint, and denies:

I. That plaintiff was at the time stated, or at any time, in the actual or peaceable or exclusive possession of the property described in the complaint, or any part thereof.

II. Denies that defendant broke into the premises of the plaintiff, as alleged, or in any manner, or at all.

III. Denies that plaintiff suffered any damage by such alleged breaking, or in any manner, or by any means, either as alleged in the complaint or at all. [Traverse the allegations of the complaint specially.]

§ 6528. Summons in forcible entry and forcible and unlawful detainer.

Form No. 1759.

[TITLE.]

The People of the State of California send greeting to A. B., Defendant.

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the . . . court of the . . . county of . . . , state of California, within three days after the service on you of this summons.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand, etc.

§ 6529. Notice to pay rent or quit.

Form No. 1760.

To A. B., tenant in possession:

Within three days after the service on you of this notice, you are hereby required to pay the rent of the premises hereinafter described, and of which you now hold possession, said rent amounting to the sum of . . . dollars, being the rent from the . . . day of . . . , 19.., to the . . . day of . . . , 19.., or deliver up possession of the said premises herein described, within said three days after service on you of this notice, said delivery of possession to be made to C. D., who is hereby authorized to receive possession thereof, or any rent due and unpaid from you. or legal proceedings will be instituted against you to recover possession of said premises, with treble rents.

Said premises are situated in the county of . . . , state of California, and described as follows: [Give description sufficiently definite to designate the premises.]

Dated this . . . day of . . . , 19..

E. F., [owner, or one entitled to the possession.]

§ 6530. Judgment in unlawful detainer.

Form No. 1761.

[TITLE.]

This cause coming on for hearing this . . . day of . . . , 19.., plaintiff appearing in person and by his attorney, R. S., Esq.,

and defendant appearing in person and by his attorney, T. W., Esq., and a jury trial having been waived by both parties in open court, the court having heard the testimony and considered the evidence, and findings of facts and conclusions of law having been waived by the parties hereto:

It now appears to the court, that all of the allegations of plaintiff's complaint are true; that on the . . . day of . . . , 19.., and for [several] months prior thereto, defendant held possession of those certain premises located in the county of . . . , state of California, and more particularly described as follows, to-wit: [description], under and by virtue of a [written, or oral] lease [if a written lease, designate it by names, dates, and registration of same, if recorded]; that on the said . . . day of . . . , 19.., there was due and owing to plaintiff from defendant under said lease for the rent of said premises, the sum of . . . dollars; that on the . . . day of . . . , 19.., due and proper demand in writing was made by plaintiff of defendant for the payment thereof, or that he surrender the possession of said premises within three days; that defendant neglected and refused, for the space of three days after said demand, to quit the possession of the said premises, or to pay the rent thereof due and unpaid as aforesaid; that there is now due and owing as rent upon said premises the sum of . . . dollars, being the rent from the . . . day of . . . , 19.., to the present time; and that defendant does now unlawfully continue in the possession of the said premises; that said lease has not by its terms expired; that in addition to the money due for rent, plaintiff has suffered damages for waste and injury, and for the detention of said premises in the sum of . . . dollars.

Now, therefore, it is ordered, adjudged, and decreed:

1. That plaintiff be restored to the possession of said premises.
2. That plaintiff have judgment against defendant for the sum of . . . dollars [rent due and damages, or treble the amount], and costs of this action.
3. That the agreement of lease entered into between plaintiff and defendant on the . . . day of . . . , 19.., and recorded in volume . . . of covenants, at page . . . , in the records of county recorder of . . . county, California, be forfeited by defendant, and the same is hereby canceled.
4. That execution shall not issue hereon until after five days from the date of entry of this judgment, during which five days

payment may be made into court, for plaintiff, of the amount found due as rent, with interest thereon, and the damages found for the unlawful detainer, and the costs of this action, whereupon this judgment shall be satisfied and defendant shall be restored to his estate under said agreement of lease, and said agreement shall continue in force according to the terms thereof.

[No. 4 to be used in case default is in payment of money, only.]

Done this . . . day of . . . , 19..

A. B., Judge.

§ 6531. Judgment in forcible entry and detainer.

Form No. 1762.

[TITLE.]

This action having been tried before the court and a jury, plaintiff appearing by A. B., Esq., his attorney, and defendant appearing by C. D., Esq., his attorney, and the issues having been tried, and the jury having returned their verdict that the plaintiff was on the . . . day of . . . , 19.., in the peaceable and actual possession of all that certain piece or parcel of land hereinafter described, and of the dwelling-house, barns [etc.] thereon; that on said date, and while plaintiff was so in possession of said premises, the defendant did, with violence and by force, enter thereon, and in a forcible manner eject said plaintiff and put him out of said premises [state any other finding of acts done], contrary to the form of the statute, and to the damage of the plaintiff in the sum of . . . dollars; that said defendant unlawfully withholds and keeps possession of said land and premises, and has so held and kept possession of the same at all times since said . . . day of . . . , 19..; that in consequence of said acts the plaintiff has been deprived of the rents, issues, and profits of said land and premises, to his damage in the sum of . . . dollars.

Now, therefore, it is ordered, adjudged, and decreed:

That plaintiff be restored to the full and peaceable possession of the said premises, situated in the county of . . . , state of California, and more particularly described as follows, to-wit: [Description.]

That defendant be ousted and ejected therefrom; and that defendant be and he is hereby enjoined from molesting or disturbing plaintiff in the peaceable possession of said premises.

That plaintiff have judgment against defendant for the sum of . . . dollars [treble] damages for waste and injury, and for the detention of said premises.

That a writ of restitution issue hereon commanding the sheriff to oust and eject the defendants, and all of them, from the lands and premises hereinbefore described, and to deliver unto the said E. F., plaintiff, the possession of said lands and premises; [and enjoining the defendants, and all of them, from molesting plaintiff in the peaceable possession of said lands and premises;] and further requiring the sheriff to satisfy the judgment for damages and costs, herein rendered, together with all accruing costs, out of the personal property of said judgment debtors, or, if sufficient personal property of said judgment debtors cannot be found, then out of the real property belonging to them on the day whereon this judgment is docketed, or at any time thereafter, in manner and form according to the statutes providing therefor.

Done this . . . day of . . . , 19...

R. S., Judge of said Court.

§ 6532. Writ of restitution—Forcible entry and unlawful detainer.

Form No. 1763.

[TITLE.]

The People of the State of California, to the Sheriff of the County of . . . , greeting:

Whereas, on the . . . day of . . . , 19.., E. F., as plaintiff, recovered judgment in the said superior court of the . . . , county of . . . , against G. H., defendant, for the restitution of certain premises in said judgment and hereinafter described. and also for the sum of . . . dollars, treble rents for the detention of said premises, . . . dollars damages, and . . . dollars costs of suit, as appears to us of record, and which judgment was docketed in the clerk's office of said court on the . . . day of . . . , 19.., [or that a transcript of the docket of said judgment was filed in the office of the county recorder of the county of . . . , on the . . . day of . . . , 19.., to be used when a judgment of a justice court is so recorded]:

Now, therefore, you the said sheriff, are hereby commanded to deliver to the said E. F., plaintiff, the possession of the lands and premises in said judgment, described as follows: [Description.]

And whereas, the sum of . . . dollars, treble rents, . . . dollars, damages, and . . . dollars, costs, are now, at the date of this writ, due on said judgment, you, the said sheriff, are hereby further required to satisfy said judgment, and all accruing costs, out of the personal property of said judgment debtor, G. H.; or, if sufficient personal property of said debtor cannot be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the aforesaid . . . county, or at any time thereafter; and make return of this writ within [twenty-five] days after your receipt hereof, with what you have done indorsed hereon.

CHAPTER CXLVIII.

TRESPASS.

§ 6533. **Trespass versus nuisance—Limitations.**—An action for trespass upon real property is limited to three years after the trespass.¹ It is sometimes quite difficult to distinguish a trespass from a nuisance. The courts of England often experienced difficulty in determining whether trespass or case was the right remedy. The same difficulty arises under the codes, when the statute of limitations is invoked. One of the best tests by which to distinguish trespass is found in the answer to the question, When was the damage done? If the damage does not come directly from the act, but is simply an after-result from the act, it is essentially consequential, and not a trespass. It is the difference between striking another with a stick and placing the stick in his way so he runs into it; between running water onto another's land and building a dam on your own land so the water backs up and onto the other's land. It is no dispossession, no ouster, nor even a trespass, to flow water backward on another person's land. It is denominated in law a nuisance, and the only modern remedy is by an action on the case.² The escaping of sewage and gases onto plaintiff's premises to his damage is a nuisance, and not trespass.³ Recovery cannot be had for timber killed without the statutory period, even though it may not have rotted until within the period.⁴

§ 6534. **Abatement of action.**—At common law a trespass dies with the trespasser.⁵ In California, section 1584 of the Code of Civil Procedure has changed the rule. It provides that "any person or his personal representatives may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken, or carried away,

¹ Cal. Code Civ. Proc., § 338.

² *Hicks v. Drew*, 117 Cal. 305-309, 49 Pac. 189; *Daneri v. Southern California Ry. Co.*, 122 Cal. 507, 55 Pac. 243.

³ *Cameron v. San Francisco*, 68 Cal.

390, 9 Pac. 430; *Donahue v. Stockton Gas etc. Co.*, 6 Cal. App. 276, 92 Pac. 196.

⁴ *Park v. Northport Smelting etc. Co.*, 47 Wash. 597, 92 Pac. 442.

⁵ *O'Connor v. Corbitt*, 3 Cal. 370.

or converted to his own use, the goods or chattels of any such person, or committed any trespass on the real estate of such person."

§ 6535. **Agent.**—If the trespass has been committed by one acting as the agent of the defendant, it may be so alleged.⁶ Where two of the defendants actually committed the act, and a third defendant instigated and employed them to do it, it may be so alleged.⁷

§ 6536. **Assignee.**—An assignee in trust for the benefit of creditors may maintain an action of trespass against any person who interferes with the assigned property.⁸ A claim for damages caused by a trespass on land is assignable, and the assignee may maintain an action to recover the same.⁹ An assignee of a lessee of state land may sue in his own name.¹⁰

§ 6537. **Co-trespassers—Allegation of.**—If it be sought to charge another with the trespass, at whose instigation and request the trespass was committed singly, it may be alleged as follows: "That on the [etc.], one A. B., at the instigation and request of the defendant, and being by him employed thereto and assisted therein, broke and entered," etc. Or, if it be sought to make both co-trespassers, it may be alleged: "That on [etc.], the defendant A. B., at the instigation and request of the defendant C. D., being by him employed thereto and assisted therein, broke and entered," etc.¹¹ For all persons who direct or request another to commit a trespass are liable as co-trespassers.¹² Where a trespass has been committed by two or more, by joint act or co-operation, they are all trespassers, and liable,¹³ if they acted in concert, or the act of one naturally produced the act of the other.¹⁴ Where several defendants are de-

⁶ *St. John v. Griffith*, 1 Abb. Pr. 39.

⁷ *Ives v. Humphreys*, 1 E. D. Smith, 196.

⁸ *McQueen v. Babcock*, 41 Barb. 337.

⁹ *More v. Massini*, 32 Cal. 590.

¹⁰ *Sequim v. Bugge*, 49 Wash. 127, 94 Pac. 922.

¹¹ *Ives v. Humphreys*, 1 E. D. Smith, 196.

¹² 2 Hill. on Torts, 293; *Hering v. Hoppock*, 15 N. Y. 413.

¹³ 2 Hill. on Torts, 292; *Hair v. Little*, 28 Ala. 236. See, also, *Houston v. Nord*, 39 Minn. 490, 40 N. W. 568.

¹⁴ *Brooks v. Clarke*, 6 Taunt. 29. See *McCloskey v. Powell*, 123 Pa. St. 62, 10 Am. St. Rep. 513, 16 Atl. 420; *State v. Smith*, 78 Me. 260, 57 Am. Rep. 802, 4 Atl. 412.

clared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *Aliter*, if a joint trespass has been proved.¹⁵ It is not necessary for plaintiff to allege the particular acts of trespass done by each trespasser.¹⁶

§ 6538. **Measure of damages.**—The cost of restoring the land to its former condition, or the diminution in value of the whole property by reason of the trespass, whichever is the lesser amount, is the actual measure of damages for trespass.¹⁷ It is competent for defendant to show that part of the damage was done by cattle and sheep of plaintiff and others.¹⁸ Damage directly resulting from the trespass, but ensuing after the commencement of the action, may be recovered without filing a supplemental complaint.¹⁹

§ 6539. **Damages—Exemplary and punitive.**—Exemplary or vindictive damages cannot be recovered for a trespass not malicious in its character.²⁰ And the rule of damages depends upon the presence or absence of fraud, malice, or oppression. In the absence of such circumstances, the rule is compensation merely, and this refers solely to the injury done to the property, and not collateral or consequential damages resulting to the owner.²¹ A party committing a trespass can be made liable for such damages only as are the proximate result of the trespass.²² The right of the plaintiff to recover damages is not affected by the fact that the trespass was not willful.²³ Where trespass is committed from wanton or malicious motives, or from a reckless disregard of the rights of others, or under circumstances of great hardship or oppression, the rule of mere compensation is

15 *McCarron v. O'Connell*, 7 Cal. 152.

16 *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342.

17 *Enid etc. Ry. Co. v. Wiley*, 14 Okla. 310, 78 Pac. 96.

18 *Pacific Live Stock Co. v. Murray*, 45 Or. 103, 76 Pac. 1079.

19 *Cosgriff v. Miller*, 10 Wyo. 190, 98 Am. St. Rep. 977, 68 Pac. 206; Cal. Civ. Code, § 3283; *McLennan v. Ohmen*, 75 Cal. 558, 17 Pac. 687;

Morgan v. Reynolds, 1 Mont. 163.

20 *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615; Wash. Bal. Codes, §§ 5656, 5657.

21 *Dorsey v. Manlove*, 14 Cal. 553.

22 *Story v. Robinson*, 32 Cal. 205. See *Empire Gold Min. Co. v. Bonanza Gold Min. Co.*, 67 Cal. 406, 7 Pac. 810; *Patchen v. Keeley*, 19 Nev. 404, 14 Pac. 347.

23 *Maye v. Yappen*, 23 Cal. 306.

not enforced, and punitive or exemplary damages may be enforced.²⁴ Defendant who had constructed a bulkhead which stood two years, and gave way under heavy floods, is not liable for exemplary damages.²⁵ A complaint for trespass to real property must contain a specific and certain averment of the actual damage done to the property, even though exemplary damages may be claimed for injury thereto under circumstances of aggravation, and, if the actual damage to the property is not averred with certainty, a demurrer for uncertainty on that ground should be sustained.²⁶

§ 6540. Designation of land.—The lines of a quarter-section of government land, distinctly marked by natural boundaries and stakes placed at convenient distances, so that the lines can be readily traced, are sufficient to authorize an action for trespass thereon under the provisions of the act of April 11, 1850.²⁷ When two mining claims adjoin each other, the ignorance of the owners of one company of the dividing-line will not excuse a trespass upon the land of another.²⁸ Where the town is subdivided intermediate the trespass and the commencement of the action, the trespass may be laid to have been done in the original town.²⁹ In an action to recover damages for a trespass alleged to have been committed on the south half of a certain land claim, evidence of the wrong must be confined to the particular tract of land described in the complaint.³⁰ The description of the premises in the complaint as a mining claim of certain dimensions, with a reference to the location certificate and the patent for metes and bounds, is sufficient.³¹

§ 6541. On navigable waters.—One has a right to use the channel of a navigable stream for floating logs at all stages of the water, and such use when the water is above the line of the mean

²⁴ *Dorsey v. Manlove*, 14 Cal. 553. See Cal. Civ. Code, §§ 3294, 3346; *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854.

²⁵ *Spencer v. San Francisco Brick Co.*, 5 Cal. App. 126, 89 Pac. 851.

²⁶ *Lamb v. Horbaugh*, 105 Cal. 680, 39 Pac. 56.

²⁷ *Taylor v. Woodward*, 10 Cal. 90.

See the case of *Stockton v. Garfrias*, 12 Cal. 315.

²⁸ *Maye v. Yappen*, 23 Cal. 306. See *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.

²⁹ *Renaudet v. Crocken*, 1 Caines, 167; *Cole & C. Cas.* 219.

³⁰ *Jennings v. Meldrum*, 15 Or. 629, 16 Pac. 646.

³¹ *Rico-Aspen etc. Min. Co. v. Enterprise Min. Co.*, 56 Fed. 131.

high tide would not be a use of adjoining land; but the land itself should not be trespassed upon.³² The use is confined to the bed of the stream.³³ A strip of land which at times is exposed at low tide, but having no permanent *situs*, is not tide-land.³⁴ A complaint for damages by erosion and overflow due to the improper driving of logs through a navigable stream is sufficient if it sets out acts showing an abuse of the right of navigation, without any allegation of negligence.³⁵ Willful and malicious destruction of fish-traps in a navigable river is trespass, even though the owner may not have entirely complied with the law in securing a license.³⁶

§ 6542. **Ditch.**—A person has no right to run a ditch through the inclosure of another without his consent.³⁷ But if defendant has a prescriptive right to use a ditch across plaintiff's land, and a right of entry for repairing it, it is immaterial how much water is passed through it.³⁸

§ 6543. **Entry without force.**—When the complaint charges an entry upon and injury to plaintiff's property, and does not charge force, the issue was held to be confined to the actions of the party after the entry, and to the damages resulting from the same;³⁹ and if such land thus entered upon is public land, inclosed with plaintiff's private land, there is no damage.⁴⁰

§ 6544. **Equitable relief.**—In an action for trespass, the law and equity must not be inseparably mixed together. The allegations must be separate, distinct, and certain. But it is not necessary that there should be express words, showing where the declaration in trespass leaves off and the bill in equity begins.⁴¹

§ 6545. **Essential facts.**—When a pleader wishes to avail himself of any statutory privilege or right, given by particular facts,

³² *Lownsdale v. Gray's Harbor Boom Co.*, 36 Wash. 198, 78 Pac. 904.

³³ *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 102 Am. St. Rep. 905, 77 Pac. 813, 70 L. R. A. 272.

³⁴ *Sengstacken v. McCormac*, 46 Or. 171, 79 Pac. 412.

³⁵ *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34.

³⁶ *Fowler v. Harrison*, 39 Wash. 617, 81 Pac. 1055.

³⁷ *Weimer v. Lowery*, 11 Cal. 104.

³⁸ *Hart v. Hoyt*, 137 Cal. xix, 70 Pac. 19.

³⁹ *Turner v. McCarthy*, 4 E. D. Smith, 247.

⁴⁰ *Martin v. Platte Valley Sheep Co.*, 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

⁴¹ See *Gates v. Kieff*, 7 Cal. 124.

those facts which the statute requires as the foundation of the right must be stated in the complaint.⁴²

§ 6546. Estate in possession, reversion, and remainder.—In New York, any person seised of an estate in possession, remainder, or reversion, may bring an action under the statute, notwithstanding an intervening estate for life or years.⁴³ One without title must have had actual possession to maintain trespass.⁴⁴

§ 6547. Forcible and unlawful.—The acts alleged must be essentially acts of trespass, forcible and unlawful, but it need not be alleged that the entry was unlawful.⁴⁵

§ 6548. Foreign miners.—The fact that parties are foreigners, and have not obtained a license to work in the mines, affords no apology for trespass.⁴⁶

§ 6549. Jurisdiction.—If the right of possession is put in issue, the superior court has exclusive jurisdiction, regardless of the amount of damages claimed.⁴⁷ The fact that the necessary parties are before a court of equity does not give jurisdiction to enjoin waste and trespass in a mine located in a foreign jurisdiction.⁴⁸ The justice court has no jurisdiction to hear a case in which the right of possession and title to land is involved.⁴⁹ An unnecessary allegation in a complaint in forcible entry, not being denied in the answer, does not oust the justice court of jurisdiction on the theory that the question of title of land is involved.⁵⁰ However, in California, justice courts have concurrent jurisdiction with the superior court in actions of forcible entry and unlawful detainer, both where the rental value of the property does not exceed twenty-five dollars per month,

⁴² *Dye v. Dye*, 11 Cal. 163. As to the essential facts to maintain the action, see *Willard v. Warren*, 17 Wend. 257.

⁴³ *Van Deusen v. Young*, 29 Barb. 9.

⁴⁴ *Patrick v. Brown*, 36 Colo. 298, 85 Pac. 325.

⁴⁵ *Id.* *Van Deusen v. Young*, 29 Barb. 9.

⁴⁶ *Mitchell v. Hagood*, 6 Cal. 148.

⁴⁷ *Cullen v. Langridge*, 17 Cal. 67, Cal. Code Civ. Proc., § 76.

⁴⁸ *Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382.

⁴⁹ *King v. Kutner-Goldstein Co.*, 135 Cal. 65, 67 Pac. 10; Cal. Code Civ. Proc., § 838.

⁵⁰ *Heiney v. Heiney*, 43 Or. 577, 73 Pac. 1038.

and the whole amount of damages does not exceed two hundred dollars.⁵¹

§ 6550. Joinder of causes.—In a complaint for trespass the plaintiff claimed five hundred dollars, as alleged value of the property destroyed, and five hundred dollars damages. Defendant demurred on the ground that two causes of action were improperly joined, and the court below sustained the demurrer. It was held that this was error.⁵² In an action of trespass, an allegation of injury to the “site for a dam,” and “dam in course of construction thereon,” and “site for a canal, and canal thereon projected, surveyed, and commenced,” constitutes but a single cause of action. They are land, and for the purposes required must necessarily be connected and continuous. But the water-right, when acquired, although intimately related to and connected with the site for a canal and dam, and canal commenced, etc., give rise to separate and distinct causes of action.⁵³ The owner of land may join in the same complaint a claim for damages as assignee, caused as a trespass on the land while it was owned by his grantor, and a claim for an injunction for a threatened injury to the land.⁵⁴ A party cannot join an action of trespass *quare clausum fregit* with ejectment, and pray for an injunction.⁵⁵ A complaint in trespass averring that the defendant wrongfully entered upon the plaintiff’s close and removed earth and gravel therefrom, destroyed ornamental shade-trees growing thereon, tore off and removed the boards from an entire wall of the plaintiff’s building, darkened the plaintiff’s windows, and erected another building on the premises, to the damage of the plaintiff in a specific sum, is not demurrable for misjoinder of causes of action, nor for ambiguity;⁵⁶ but a complaint alleging that by wrongful acts of the defendant the property of the plaintiff was damaged, her character was injured, and that her health has been permanently impaired, and that by reason of all these acts she has been damaged in a specified sum, for which she asks judgment, shows a misjoinder of distinct causes of action, forbidden by section 427 of the California Code of Civil Procedure.⁵⁷

51 Cal. Code Civ. Proc., § 113, subd. 1; Ivory v. Brown, 137 Cal. 603, 70 Pac. 657.

52 Tendesen v. Marshall, 3 Cal. 440.

53 Nevada County etc. Canal Co. v. Kild, 37 Cal. 309.

54 More v. Massini, 32 Cal. 590.

55 Bigelow v. Gove, 7 Cal. 133.

56 Strohlburg v. Jones, 78 Cal. 381, 20 Pac. 705.

57 Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56.

§ 6551. **Joinder of parties.**—It is unnecessary to join as defendants in an action for damages for trespass all persons who unite in committing it; all or any may be sued.⁵⁸ The complaint in an action to recover for a joint trespass against individuals who are husband and wife which does not allege their marital relation is not demurrable for a failure to state why she is joined as a defendant with him.⁵⁹ A plaintiff cannot by mere notice bring in parties not sued in an action of trespass when there is no pretense that they were trespassers.⁶⁰ In an action by the parties whose property has been wrongfully taken under legal process, all who join or participate in the trespass are jointly liable as joint trespassers.⁶¹ Defendants cannot by motion compel plaintiff to specify the particular wrongful act done by each defendant.⁶²

§ 6552. **Mining claim.**—In an action for trespass upon a mining claim, where the complaint avers that the defendants are working upon and extracting the mineral from the claim, and prays for a perpetual injunction, and the answer admits the entry and work, and takes issue upon the title of the mine, and the jury find in favor of the plaintiffs, the court should decree the equitable relief sought, and enjoin defendants from future trespasses.⁶³ The locator of a valid placer claim is entitled to all unknown lodes within its boundaries; and a subsequent locator of such unknown lodes is a trespasser who may be ejected.⁶⁴ Imperfect but not wholly void locations may be amended by additional certificates.⁶⁵ Neither party having title, the sole question is one of right of possession.⁶⁶

In a suit against a railroad company for damages for taking a portion of a mining claim, and cutting timber thereon, a com-

⁵⁸ *Mandlebaum v. Russell*, 4 Nev. 551.

⁵⁹ *Waters v. Dumas*, 75 Cal. 563, 17 Pac. 685.

⁶⁰ *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647.

⁶¹ *Lewis v. Johns*, 34 Cal. 629.

⁶² *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342.

⁶³ *McLaughlin v. Kelly*, 22 Cal. 211. As to action for injury to mining claim, see *McFeters v. Pierson*, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; *Noonday Min. Co. v.*

Orient Min. Co., 6 Sawy. 299, 1 Fed. 522.

⁶⁴ *Clipper Min. Co. v. Eli Min. etc. Co.*, 29 Colo. 377, 93 Am. St. Rep. 89, 68 Pac. 286, 24 Sup. Ct. 632, 48 L. Ed. 944, 194 U. S. 220; *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054.

⁶⁵ *Sullivan v. Sharp*, 33 Colo. 346, 80 Pac. 1054; *Peoria etc. Mill. & Min. Co. v. Turner*, 20 Colo. App. 474, 79 Pac. 915.

⁶⁶ *Columbia Copper Min. Co. v. Duchess Min. etc. Co.*, 13 Wyo. 244, 79 Pac. 385.

plaint showing an entry without permission on a mining claim in the plaintiffs' possession, and the doing an injury to the soil and timber, sufficiently avers possession, entry, and damage.⁶⁷

§ 6553. **Ouster.**—No ouster is necessary to maintain an action of trespass. Any unlawful entry is enough.⁶⁸

§ 6554. **Possession and title of plaintiff.**—In an action of trespass upon real property the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises; and his right to the possession is not involved unless the defendant tenders an issue upon the fact, and in that case⁶⁹ the right of recovery depends both on possession in fact and the right of possession.⁷⁰ Possession in the plaintiff is sufficient to enable him to maintain an action for trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages.⁷¹ The defendant has no right to inquire into the good faith of plaintiff's possession.⁷² To maintain an action of trespass *quare clausum fregit*, it was formerly held necessary for the plaintiff to establish an actual possession of the *locus in quo*, but under more modern decisions a constructive possession is held sufficient.⁷³ One who has located upon land under the homestead law, but has not made final proof, has sufficient ownership to maintain trespass for flooding his land.⁷⁴ Actual possession is sufficient to maintain such action against a mere stranger or intruder. The possession by the tenant is possession by the plaintiff sufficient to support this averment.⁷⁵ It is enough to show

67 Jackson v. Dines, 13 Colo. 90, 21 Pac. 918.

68 Rowe v. Bradley, 12 Cal. 226; Hatch v. Donnell, 74 Me. 163.

69 Holman v. Taylor, 31 Cal. 338.

70 Pollock v. Cummings, 38 Cal. 683.

71 McCarron v. O'Connell, 7 Cal. 152; Bequette v. Caulfield, 4 Cal. 278, 60 Am. Dec. 615; Fitzgerald v. Urton, 5 Cal. 308; Palmer v. Aldridge, 16 Barb. 131, and cases cited; Hall v. Warren, 2 McLean, 332, Fed. Cas. No. 5952. See Canavan v. Gray, 64 Cal. 5, 27 Pac. 788; Stahl v. Grover, 80 Wis. 650, 50 N. W. 589; Spurlock

v. Port Townsend etc. R. R. Co., 13 Wash. 29, 42 Pac. 520; Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668, 20 L. R. A. 590; Hill v. Water Commissioners, 77 Hun, 491, 28 N. Y. Supp. 805.

72 Eberhard v. Toulumne County Water Co., 4 Cal. 308.

73 See Nevada County etc. Canal Co. v. Kidd, 37 Cal. 282; Moon v. Avery, 42 Minn. 405, 44 N. W. 257; Randall v. Sanders, 87 N. Y. 578.

74 Wendel v. Spokane Co., 27 Wash. 121, 91 Am. St. Rep. 825, 67 Pac. 576.

75 Sumner v. Tileston, 7 Pick. 198;

possession at the time of the injury.⁷⁶ Where the plaintiff shows facts which would entitle him to relief in a common-law action on the case, the fact that he alleges that he was in possession is immaterial, and the allegation may be treated as surplusage.⁷⁷

§ 6555. **Tearing down gate.**—If the complaint in an action for an alleged trespass avers that defendants unlawfully entered on plaintiff's land and tore down a gate, the gist of the action is the entry, and the removal of the gate is a mere matter of aggravation, and if the plaintiff fail to prove the gist he cannot recover for the aggravation.⁷⁸

§ 6556. **Cotenants, actions by.**—One tenant in common may recover possession of the entire tract of land as against all except his cotenants.⁷⁹ They may sue jointly.⁸⁰ Husband and wife may sue jointly for trespass, and the trespasser cannot avoid liability to one of the cotenants by showing payment for the damage to the other without the knowledge or consent of the one now suing.⁸¹ One cotenant may sue for conversion of personal property without joining his co-owners, and this without alleging who is the owner of the other part, and defendant claiming to be such owner of the other share of the property must plead such defense.⁸²

§ 6557. **Tenants in common.**—Ordinarily and at common law trespass will not lie by one tenant in common against his cotenant; but when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party.⁸³

Lindenbower v. Bentley, 86 Mo. 515; Gunsolus v. Lormer, 54 Wis. 630, 12 N. W. 62.

⁷⁶ Vowles v. Miller, 3 Taunt. 137.

⁷⁷ Rogers v. Duhart, 97 Cal. 500, 32 Pac. 570. For averments on a complaint for undermining the party wall of plaintiff's house, see Eno v. Del Vecchio, 4 Duer, 53. For averments of complaint for an injunction restraining defendant from excavating to undermine plaintiff's land, see Farrand v. Marshall, 19 Barb. 380. For injuries to trees, timber, or underwood, and damages therefor, see Cal. Civ. Code, § 3346. As to ownership of trees in or along a highway,

see Cal. Pol. Code, § 2633. As to ownership of trees whose trunks stand wholly upon the land of one, though the roots grow into the land of another, see Cal. Civ. Code, § 833. As to line-trees, see Cal. Civ. Code, § 834.

⁷⁸ Pico v. Colimas, 32 Cal. 578.

⁷⁹ Field v. Tanner, 32 Colo. 278, 75 Pac. 916.

⁸⁰ Cal. Code Civ. Proc., § 384.

⁸¹ Wagoner v. Silva, 139 Cal. 559, 73 Pac. 433.

⁸² Boley v. Allred, 25 Utah, 402, 71 Pac. 869.

⁸³ Co. Lit. 200 a, b; Crabbe on Law of Real Property, § 2318 b; Waterman v. Soper, 1 Ld. Raym. 737.

But one tenant in common cannot maintain trespass against another for taking in the ordinary course the whole profits of land.⁸⁴ If title is alleged, a general averment will be sufficient, without setting out the source of title.⁸⁵ And the allegation of title sufficiently imports possession in an action of trespass on land.⁸⁶ A judgment in trespass does not necessarily determine the title to the property.⁸⁷ The personal action cannot be made to test the title of the property as between conflicting claimants.⁸⁸ At common law, when one tenant in common destroys the subject of the tenancy, trespass will lie at the suit of the injured party.⁸⁹ If one tenant in common destroy the thing in common, as if he grub up and destroy a hedge, or prevent his cotenant of a fold from erecting hurdles, trespass lies.⁹⁰ A tenant in common putting into the pasture more stock than his share of the land will support is not trespassing.⁹¹ If one tenant in common enters upon his cotenant, and ousts him of his premises, trespass *quare clausum fregit* lies for the injury.⁹² Hence, an action will lie for injury to trees standing on a line between plaintiff's and defendant's lands, whether the parties be regarded as tenants in common of such trees or not.⁹³

§ 6558. **Demand.**—Where trespassers cut wood on land belonging to the plaintiff, and sold it to the defendants, who were *bona fide* purchasers, it was held that no previous demand was requisite to sustain an action for the recovery of the wood or its value.⁹⁴

§ 6559. **Complaint.**—A complaint is defective when trespasses are pleaded in general allegations only.⁹⁵ A complaint, good against general demurrer, and also upon grounds of unintelligibility, uncertainty, and ambiguity, is exemplified as follows: Allege

⁸⁴ *Jacobs v. Seward*, L. R., 4 C. P. 328.

⁸⁵ *Daley v. City of St. Paul*, 7 Minn. 390.

⁸⁶ *Cowenhoven v. City of Brooklyn*, 38 Barb. 9.

⁸⁷ *Brennan v. Gaston*, 17 Cal. 372.

⁸⁸ *Halleck v. Mixer*, 16 Cal. 574. See *Nevada County etc. Canal Co. v. Kidd*, 37 Cal. 282.

⁸⁹ Co. Lit. 200 a, b; *Crabbe on Law of Real Property*, § 2318 b;

Waterman v. Soper, 1 Ld. Raym. 737.

⁹⁰ *Browne on Actions*, 414; *Voyce v. Voyce*, Gow N. P. Cas. 201; 8 Barn. & Cress. 257.

⁹¹ *Haskins v. Andrews*, 12 Wyo. 458, 76 Pac. 588.

⁹² *Erwin v. Olmsted*, 7 Cow. 229.

⁹³ *Dubois v. Beaver*, 25 N. Y. 123, 82 Am. Dec. 326.

⁹⁴ *Whitman G. & S. Min. Co. v. Tittle*, 4 Nev. 494.

⁹⁵ *Wilkeson v. Driver*, 9 Wash. 177, 37 Pac. 307.

ownership in plaintiff of land abutting upon certain street; that said property is supplied with water for domestic use by means of an iron pipe belonging to plaintiff, laid beneath the surface of said street, and connected with the city water system; that defendant willfully and maliciously plowed up said street in front of said premises and dug up and carried away all of said pipe, and threatens to disconnect and carry away all pipe that might be placed therein by plaintiff, and to plow up the street as he sees fit, etc.⁹⁶ To enjoin maintenance of a ditch across his land plaintiff may allege ownership, and that defendant without right dug the certain ditch, without alleging that defendant's entry and acts on the land were wrongful and unlawful.⁹⁷ A defective complaint, seeking treble damages under the statute,⁹⁸ will, if sufficient therefor, stand as a complaint for trespass or waste.⁹⁹

§ 6560. **For cutting timber.**—An action for trespass lies for cutting and carrying away timber,¹⁰⁰ though the land be not inclosed.¹⁰¹ Trover lies as soon as timber is cut by a trespasser.¹⁰² In California, triple damages may be assessed for cutting and carrying away trees, etc.¹⁰³ But nothing in code section 733 authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land, or adjoining it.¹⁰⁴ The damages should be estimated by all the circumstances and the purpose for which such trees were used. The measure of damages is not the value of such trees, as for wood, but the injury done to the land by destroying them.¹⁰⁵ The value of stumpage on the land is material in such a case.¹⁰⁶

§ 6561. **Actual possession.**—In actions for damages for injury to real property, title or actual possession at the time of the injury must be shown.¹⁰⁷

⁹⁶ *Roberts v. Hall*, 147 Cal. 434, 82 Pac. 66.

⁹⁷ *McRae v. Blakeley*, 3 Cal. App. 171, 84 Pac. 679.

⁹⁸ Or. B. & C. Codes, § 348.

⁹⁹ *Roots v. Boring Junction etc. Lumber Co.*, 50 Or. 298, 92 Pac. 811, 94 Pac. 182.

¹⁰⁰ Cal. Code Civ. Proc., § 733.

¹⁰¹ *Wells v. Howell*, 19 Johns. 385;

Tonawanda R. R. Co. v. Munger, 5 Denio, 255, 49 Am. Dec. 239.

¹⁰² *Sampson v. Hammond*, 4 Cal. 184.

¹⁰³ Cal. Code Civ. Proc., § 733.

¹⁰⁴ Cal. Code Civ. Proc., § 734.

¹⁰⁵ *Chipman v. Hibberd*, 6 Cal. 162.

¹⁰⁶ *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.

¹⁰⁷ *Gardner v. Heart*, 1 N. Y. 528.

§ 6562. **Broke plaintiff's close.**—It is not necessary to state that the defendant broke the plaintiff's close.¹⁰⁸

§ 6563. **Damages—Treble.**—To entitle to treble damages under the statute, the complainant must refer to the act.¹⁰⁹ In actions for waste, when treble damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either cite the statute or conclude, to the damage of the plaintiff against the form of the statute.¹¹⁰ The complaint must also aver that the defendant cut them knowingly, willfully, or maliciously, in order to recover treble damages.¹¹¹ Without such averment the plaintiff may recover simple damages.¹¹²

§ 6564. **Turning out cattle.**—One who commits a trespass by turning cattle out of an inclosure upon the public lands cannot be made liable to the owner for the loss of the cattle, if the owner has been notified to take care of them.¹¹³

§ 6565. **Unlawful.**—The acts alleged must be essentially acts of trespass, forcible and unlawful; but it need not be alleged in so many words that the entry was unlawful.¹¹⁴

§ 6566. **Who may maintain action.**—Any person seised of an estate in remainder or reversion may bring an action under it, notwithstanding any intervening estate for life or years.¹¹⁵ But the plaintiff must allege and prove that the injury for which he sues is an injury to the reversion, and not merely an injury to the possessory rights of the tenant.¹¹⁶ The plaintiff is not entitled to recover damages for a trespass *quare clausum fregit*, alleged in his complaint to have been committed on his own land, when

¹⁰⁸ Wells v. Howell, 19 Johns. 385.
See Tonawanda R. R. Co. v. Munger,
5 Denio, 259, 49 Am. Dec. 239.

¹⁰⁹ Brown v. Bristol, 1 Cow. 176.

¹¹⁰ Chipman v. Emeric, 3 Cal. 283,
5 Cal. 239.

¹¹¹ Barnes v. Jones, 51 Cal. 303;
Gardner v. Lovegren, 27 Wash. 356,
67 Pac. 615; Cosgriff v. Miller, 10
Wyo. 190, 98 Am. St. Rep. 977, 68
Pac. 206.

¹¹² Id.; Austin v. Huntsville etc.
Min. Co., 72 Mo. 535, 37 Am. Rep.

446; Alt v. Groselose, 61 Mo. App.
409; Von Hoffman v. Kendall, 17 N.
Y. Supp. 713.

¹¹³ Story v. Robinson, 32 Cal. 205.

¹¹⁴ Van Deusen v. Young, 29 Barb.
9.

¹¹⁵ Van Deusen v. Young, 29 Barb.
9; Aycock v. Raleigh etc. R. R. Co.,
89 N. C. 321; Mayor etc. v. Lyon, 69
Ga. 577.

¹¹⁶ Geer v. Fleming, 110 Mass. 39;
Bobb v. Syenite Granite Co., 41 Mo.
App. 642.

in fact the trespass was committed on another piece of land.¹¹⁷ An action can be maintained by the mortgagee of real estate, to recover damages for wrongful and fraudulent injuries done to the mortgaged property, by which the security of the mortgage has been impaired.¹¹⁸

§ 6567. "With force and arms, broke and entered."—Under our system of pleading, the words "with force and arms, broke and entered," do not confine the proof to the direct and immediate damage, as in the old action of trespass; and the facts being clearly set out in the complaint, an addition of these words was held to be surplusage.¹¹⁹

§ 6568. Injunction.—A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct.¹²⁰ But it must show irreparable injury to the estate—something more than destruction of crops and shrubbery, even where defendant is insolvent.¹²¹ Irreparable injury is done if partitions of a leased building are torn out.¹²² An injunction will not be dissolved, restraining defendants from felling trees, where the question of boundary is in dispute, especially where the defendant's bond will fully protect the defendant for any delay, if it should turn out that they have the right.¹²³ Courts of equity should hesitate to grant injunctions against trespass under color of right or claim of title.¹²⁴ Sinking a mining shaft on a forty-acre tract of ground used for the manufacture of brick, and throwing the debris therefrom upon the surface, is not irrepa-

¹¹⁷ Doherty v. Thayer, 31 Cal. 140.

¹¹⁸ Robinson v. Russell, 24 Cal. 467. See, further, as to who may maintain the action, Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; Willey v. Laraway, 64 Vt. 559, 25 Atl. 436; Anderson v. Thunder Bay etc. Broom Co., 57 Mich. 216, 23 N. W. 776; Lawry v. Lawry, 88 Me. 482, 34 Atl. 273; Heilbron v. Heinlen, 72 Cal. 371, 14 Pac. 22; Stevens v. Stevens, 96 Ga. 374, 23 S. E. 312.

¹¹⁹ Darst v. Rush, 14 Cal. 81. Allegation of damage—as to sufficiency, see Mallory v. Thomas, 98 Cal. 644, 33 Pac. 757; Razzo v. Varni, 81 Cal. 289, 22 Pac. 848.

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¹²⁰ Gates v. Kieff, 7 Cal. 125. As to jurisdiction to enjoin trespass, see Mendenhall v. Harrisburg Water Co., 27 Or. 38, 39 Pac. 399; Garrett v. Bishop, 27 Or. 349, 41 Pac. 10; Me-Broom v. Thompson, 25 Or. 559, 42 Am. St. Rep. 806, 37 Pac. 57.

¹²¹ Moore v. Halliday, 43 Or. 243, 99 Am. St. Rep. 724, 72 Pac. 801.

¹²² Meyer v. First Nat. Bank, 10 Idaho, 175, 77 Pac. 334.

¹²³ Buckelew v. Estell, 5 Cal. 108; Sears v. Ackerman, 138 Cal. 583, 72 Pac. 171; Elliott v. Bloyd, 40 Or. 326, 67 Pac. 202.

¹²⁴ Shields v. Johnson, 10 Idaho, 454, 79 Pac. 394.

nable injury sufficient to authorize injunction,¹²⁵ if it does not appear that the prospector is insolvent.¹²⁶

§ 6569. **Public lands, occupants of.**—Prior possession of public lands will entitle the possessor to maintain an action against a trespasser.¹²⁷ As between occupants of public lands, neither party can claim the right to the growing timber thereon. The act of Congress of March 2, 1831, prohibits the cutting or destruction of timber on the public lands.¹²⁸ A defendant who peaceably drives his cattle upon public land, though it be inclosed by plaintiff with some of his own land, is not trespassing.¹²⁹ The statute making possessory rights of settlers on public lands for agricultural purposes yield to the rights of miners has legalized what would otherwise be a trespass, and the act cannot be extended by implication to cases not especially provided for.¹³⁰ One who claims public lands in California for raising fruit-trees or crops cannot enjoin miners from digging up the same for mining purposes, unless he can show priority of right before the land was located for mining purposes.¹³¹

§ 6570. **Who may maintain the action.**—The plaintiff out of possession cannot sue for the property severed from the freehold when the defendant is in possession of the premises from which the property was severed, if he holds them adversely, in good faith, under claim and color of title.¹³² Under the California statute, an executor may maintain an action for trespass committed upon the real estate of his testator in his lifetime.¹³³

§ 6571. **Trespass quare clausum fregit.**—In trespass *quare clausum fregit* it is incumbent on the plaintiff to show that he was in the actual possession of the premises at the time of the alleged trespass, and the defendant may prove under a general denial that a tenant of the plaintiff was in the actual posses-

¹²⁵ King v. Mullins, 27 Mont. 364, 71 Pac. 155.

¹²⁶ Harley v. Mont. Ore Purchasing Co., 27 Mont. 388, 71 Pac. 407.

¹²⁷ Grover v. Hawley, 5 Cal. 485; Waring v. Loomis, 35 Wash. 85, 76 Pac. 510; Howard v. Perrin, 200 U. S. 71, 26 Sup. Ct. 195, 50 L. Ed. 374, 8 Ariz. 347, 76 Pac. 460.

¹²⁸ Rogers v. Soggs, 22 Cal. 444.

¹²⁹ Martin v. Platte Valley Sheep Co., 12 Wyo. 432, 76 Pac. 571, 78 Pac. 1093.

¹³⁰ Weimer v. Lowery, 11 Cal. 104.

¹³¹ Ensminger v. McIntire, 23 Cal. 593.

¹³² Halleck v. Mixer, 16 Cal. 574.

¹³³ Code Civ. Proc., § 1583; Haight v. Green, 19 Cal. 113.

sion.¹³⁴ Where the alleged trespass is one constituting a permanent and necessary injury to the market value of the plaintiff's fee in the land trespassed on, the failure of the declaration to allege that the plaintiff was in possession of the land at the time of the trespass does not render the declaration demurrable.¹³⁵

§ 6572. **Gist of the action.**—The allegations that the defendant unlawfully and willfully permitted said sheep to be herded, and did herd the same, upon the lands of which the plaintiff was then and still is the owner, and, in a subsequent paragraph, that defendant herded and permitted said sheep to be herded in and upon the above-described barley-field, constitute the gist of the action.¹³⁶

§ 6573. **Herding sheep.**—The rule of the common law of England, that every man is bound to keep his beasts within his own close under the penalty of answering in damages for all injuries resulting from their ranging at large, never was the law of California, the statutes of 1850,^{136a} being directly in conflict with and repugnant to that rule; so of the other subsequent acts on the same subject.¹³⁷

§ 6574. **Lawful fences.**—A party cannot recover for injuries done by cattle breaking into plaintiff's close unless the land entered be inclosed by a fence of the character described by statute, or at least by an inclosure equivalent in its capacity to exclude cattle to the statutory fence.¹³⁸ A complaint in an action to recover for injuries by trespassing animals to lands which are not alleged to have been inclosed does not state a cause of action, if it is not alleged that the trespass was instigated by the defendant, or that he had notice thereof.¹³⁹

¹³⁴ Uttendorffer v. Saegers, 50 Cal. 496.

¹³⁵ Jacksonville etc. R. R. Co. v. Griffin, 33 Fla. 602, 15 South. 336.

¹³⁶ Logan v. Gedney, 38 Cal. 579. See Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Comerford v. Dupuy, 17 Cal. 308; Richmond v. Sacramento Valley R. R. Co., 18 Cal. 355. See, also, Hittell's Codes and Statutes of California, pars. 15, 826 et seq.

^{136a} Stats. 1850, pp. 131-219.

¹³⁷ See Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Comerford v. Dupuy, 17 Cal. 308; Richmond v. Sacramento Valley R. R. Co., 18 Cal. 355; Logan v. Gedney, 38 Cal. 579.

¹³⁸ Comerford v. Dupuy, 17 Cal. 308.

¹³⁹ Merritt v. Hill, 104 Cal. 184, 37 Pac. 893. Compare Hahn v. Garratt, 69 Cal. 147, 10 Pac. 329,—a decision governed by a local law applicable to a particular county alone.

§ 6575. **Lien on trespassing animals.**—The sale of another person's animal to pay off a lien upon the animal, made without the legal notice to the owner, who is known, is a trespass *ab initio*, even though the owner has full knowledge of the proceedings, and such owner can recover the animal without payment of the lienor's claim.¹⁴⁰ In Utah, live-stock herded or grazing upon land of another without permission are liable for all damages done, and may be attached as security therefor, but the levy of the writ is not confined to the cattle alone.¹⁴¹

§ 6576. **The lessor of personal property**, such as sheep, cannot maintain trespass or trover for an injury done to the property by a stranger during the term of the lease, and while the lessee is in the actual possession of the property.¹⁴² Bare possession alone of a chattel is sufficient title or right to maintain the action against a wrongdoer.¹⁴³

§ 6577. **Action, transitory and local.**—Where the writ mentions a trespass with force and arms upon the storehouse of the plaintiff, and a seizure and destruction of goods, it covers a transitory as well as a local action.¹⁴⁴ Actions of trespass, except those for injury to real property, are transient in their character.¹⁴⁵ Under the provisions of the New York Code of Civil Procedure, neither trespass upon real property nor trover is a local action.¹⁴⁶

§ 6578. **Officer without process.**—An officer without process who puts a person in possession as receiver commits a trespass.¹⁴⁷

§ 6579. **Trespass to the person.**—Where a person with a crowd of others entered the premises of plaintiff, knowing that admission had only been obtained by an action of violence by another person in the crowd, it was held that he was liable as a trespasser.¹⁴⁸ But no action lies for a trespass to the person which

¹⁴⁰ Colo. (Mills') Annot. Stats., § 114; Bailey v. O'Fallon, 30 Colo. 419, 70 Pac. 755.

¹⁴¹ Smith v. Fisher, 24 Utah, 506, 68 Pac. 849.

¹⁴² Triscony v. Orr, 49 Cal. 612.

¹⁴³ Sickles v. Gould, 51 How. Pr. 22; Wheeler v. Lawson, 103 N. Y. 40, 8 N. E. 360; Laing v. Nelson, 41 Minn. 521, 43 N. W. 476.

¹⁴⁴ McKenna v. Fisk, 1 How. 241, 11 L. Ed. 117.

¹⁴⁵ Howe v. Willson, 1 Denio, 181; Cage v. Jeffries, Hempst. 409, Fed. Cas. No. 2287.

¹⁴⁶ Polley v. Wilkisson, 5 Civ. Pro. Rep. 135; Abb. Sel. Cas. 373.

¹⁴⁷ Rowe v. Bradley, 12 Cal. 226.

¹⁴⁸ Chandler v. Egan, 28 How. Pr. 98.

is neither intentional nor the result of negligence.¹⁴⁹ In removing a trespasser from a train such force as appears reasonably necessary may be used.¹⁵⁰

§ 6580. **Defense—General issue.**—Any matter done by virtue of a warrant must be specially pleaded.^{150a} The defendant may prove under a general denial that a tenant of the plaintiff was in the actual possession.¹⁵¹ Where the defendant is in the adverse possession trespass will not lie.¹⁵²

§ 6581. **Defense—Title in defendant.**—In an action for damages for an unlawful entry on plaintiff's premises, an answer setting up title in defendant, and that the plaintiff had, by issuing an injunction, deprived defendant of possession, it was held, under the circumstances, sufficient to make out a counterclaim.¹⁵³ In trespass on land, plaintiff's title is not put in issue by a general denial.¹⁵⁴ A plaintiff who recovers in trespass *quare clausum fregit* does not thereby become invested with the title, or succeed to the interest which the defendant may have had in the property.¹⁵⁵ Defendant, sued for conversion, claiming to be a co-owner of personal property, cannot raise such issue by demurrer if plaintiff's complaint does not show who the co-owner is. It must be pleaded in defense.¹⁵⁶

§ 6582. **Denial of damage.**—In an action of trespass, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specially traversed, it is doubtful whether such answer amounts to a denial of the damage.¹⁵⁷

¹⁴⁹ Stanley v. Powell (1891), 1 Q. B. Div. 86.

¹⁵⁰ Clark v. Great Northern Ry. Co., 37 Wash. 537, 79 Pac. 1108.

^{150a} Co. Lit. 282; Butterworth v. Soper, 13 Johns. 443; Martin v. Clark, Hempst. 259, Fed. Cas. No. 9158a.

¹⁵¹ Uttendorffer v. Saegers, 50 Cal. 496.

¹⁵² Raffetto v. Fiori, 50 Cal. 363. In an action for trespass or trespass on the case, as to what is put in issue by the general issue, see Richardson v. City of Boston, 19 How. 263, 15 L. Ed. 639; Goddard v. Davis, 1 Cranch

C. C. 33, Fed. Cas. No. 5491; Hogan v. Brown, 1 Cranch C. C. 75, Fed. Cas. No. 6581; Pancoast v. Barry, 1 Cranch C. C. 176, Fed. Cas. No. 10705.

¹⁵³ Ashley v. Marshall, 29 N. Y. 494.

¹⁵⁴ Richardson v. City of Boston, 19 How. 263, 15 L. Ed. 639; Squires v. Seward, 16 How. Pr. 478; Althouse v. Rice, 4 E. D. Smith, 348. See Ferris v. Brown, 3 Barb. 105.

¹⁵⁵ Williams v. Sutton, 43 Cal. 65.

¹⁵⁶ Boley v. Allred, 25 Utah, 402, 71 Pac. 869.

¹⁵⁷ Rowe v. Bradley, 12 Cal. 226.

§ 6533. **Insufficient defense.**—In trespass *quare clausum fregit* the defense that the act complained of was not committed where the plaintiff lays it, but in another lot where defendant was justified in committing said act, is in fact only a denial of what plaintiff is bound to prove, and only amounts to the general issue, and is bad on demurrer.¹⁵⁸ In trespass *quare clausum fregit*, where the complaint avers matters of aggravation after the entry, an answer justifying the aggravating matter, but admitting plaintiff's title and possession, does not state facts sufficient to constitute a defense.¹⁵⁹ If denial is only that the trespass was knowingly and willfully done, the admission is sufficient for a finding that the trespass was wrongful and unlawful.¹⁶⁰ Payment of damage for the trespass made to one cotenant without knowledge or consent of the other cotenants is no defense to a suit for such trespass brought by such other cotenants.¹⁶¹

§ 6584. **Ownership.**—If ownership is alleged and denied, the issue is immaterial. If the defendant seeks to justify the taking, by proof of ownership in a third person, he must set up in his answer not only such property in the third person, but also connect himself with such owner, by averring that the taking was by his authority, or by virtue of process or right against such owner.¹⁶²

§ 6585. **Possession and title must be traversed.**—In an action for trespass to lands, where the answer does not traverse the plaintiff's possession or title, he is not put to prove his title, although the land be wild and vacant.¹⁶³ Where, in such action, the possession is disputed, and the defendant relies upon his legal title to justify his acts, he may put it in issue by his answer and have it tried and determined.¹⁶⁴ Possession by defendant may be proved under the general issue.¹⁶⁵ In an action for a trespass upon land, alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of

158 *Dorman v. Long*, 2 Barb. 214.

159 *Pico v. Colimas*, 32 Cal. 578.

160 *Wagoner v. Silva*, 139 Cal. 559, 73 Pac. 433.

161 *Id.*

162 *Kissam v. Roberts*, 6 Bosw. 154.

163 *O'Reilly v. Davies*, 4 Sandf. 722.

164 *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732, 48 N. W. 492.

165 *Babcock v. Lamb*, 1 Cow. 238; *Saunders v. Wilson*, 15 Wend. 338.

possession for the defendants to aver in their answer that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff.¹⁶⁶ Where the complaint alleges that the plaintiffs are the owners and in possession of a mine, an answer which denies that they are the owners or in possession of a certain part of the mine, describing it, does not admit the plaintiff's ownership of that part.¹⁶⁷ A plea of possessory title under a demise from a third person, if it did not give express color, was bad, as amounting to the general issue.¹⁶⁸ In trespass *quare clausum fregit*, in a justice's court, defendant may entitle himself to a verdict by showing either title in himself, title in a third person, or possession out of the plaintiff.¹⁶⁹

§ 6586. **Cross-complaint.**—If plaintiff wishes to object to defendant's cross-complaint which brings up the question of title to other and separate land, asking to restrain plaintiff from making any claim, etc., thereto, such objection should be raised by motion or demurrer.¹⁷⁰ A counterclaim for a trespass on land and injury to defendant's crops by plaintiff's cattle cannot be maintained in an action of claim and delivery for said cattle.¹⁷¹

§ 6587. **Defense—Defective fence.**—That the fence through which the cattle entered, and which the plaintiff was bound to keep in repair, was defective, may be shown by the defendant.¹⁷²

§ 6588. **Defense—Easement.**—When the act appears to be *prima facie* a trespass, any matter of justification, by virtue of any authority or easement, must be pleaded.¹⁷³ In trespass *quare clausum fregit*, an answer justifying merely because the defendant has an easement on the land contains no defense.¹⁷⁴

¹⁶⁶ McCormick v. Bailey, 10 Cal. 230. Joint trespass—as to plea in bar, see Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668, 20 L. R. A. 590; Brown v. City, 3 Allen, 474; Bowman v. Davis, 13 Colo. 297, 22 Pac. 507.

¹⁶⁷ Jones v. Prospect Mountain Tunnel Co., 21 Nev. 339, 31 Pac. 642.

¹⁶⁸ Collet v. Flinn, 5 Cow. 466; Underwood v. Campbell, 13 Wend. 78.

¹⁶⁹ Douglas v. Valentine, 7 Johns. 273; explaining Strong v. Smith, 2

Caines, 28. See, also, Uttendorffer v. Saegers, 50 Cal. 496; Land etc. Co. v. Gasquet, 45 La. Ann. 759, 13 South. 171.

¹⁷⁰ Power v. Fairbanks, 146 Cal. 611, 80 Pac. 1075.

¹⁷¹ Glide v. Kayser, 142 Cal. 419, 76 Pac. 50.

¹⁷² Colden v. Eldred, 15 Johns. 220.

¹⁷³ Babcock v. Lamb, 1 Cow. 238; Saunders v. Wilson, 15 Wend. 338.

¹⁷⁴ Pico v. Colimas, 32 Cal. 578.

§ 6589 Defense—License, how pleaded—Mineral land.—License to enter on the premises of another must be specially pleaded.¹⁷⁵ But entering under a void license is a trespass.¹⁷⁶ A lessee continuing to work a mine after notice of his forfeiture, for failure to sink the shaft at a certain rate, is not a willful trespasser, though mistaken in his contention that there was no forfeiture, and he should be allowed for the expense of mining the ore taken out after such forfeiture.¹⁷⁷ Where a miner enters upon land in the possession of another, claiming the right to enter for mining purposes, he must justify his entry by showing: 1. That the land is public land; 2. That it contains mines or minerals; 3. That he enters for the *bona fide* purpose of mining; and such justification must be affirmatively pleaded in the answer, with all requisite averments, to show a right under the statute or by law to enter.¹⁷⁸ In an action for damages for an alleged trespass upon the plaintiff's land, if the defendant justifies the alleged trespass under the act in relation to laying out and establishing roads, he must in his answer show a strict compliance with all the provisions of the statute.¹⁷⁹

§ 6590. Justification—Essential averments.—An answer justifying a trespass on the ground of official duty should aver that defendant is an officer, and what his official duty is, and if there are many defendants, it should state they entered in aid of the officer.¹⁸⁰ An answer justifying a seizure under a writ of attachment does not state facts constituting a defense if it fails to allege that defendant in the attachment suit was the owner of the property.¹⁸¹ In an answer justifying seizure under execution, defendant should not only set out the execution, but the judgment on which it is founded, and that he is an officer, properly acting under such execution.¹⁸² It may be laid down as a general rule that the facts constituting the justification must be fully set up.¹⁸³ Nor can this justification be made by a general denial

175 Haight v. Badgeley, 15 Barb. 499; Beaty v. Swarthout, 32 Barb. 293; Alford v. Barnum, 45 Cal. 482; Lockhart v. Geir, 54 Wis. 133, 11 N. W. 245.

176 Chandler v. Edson, 9 Johns. 362.

177 Montrozona etc. Co. v. Thatcher, 19 Colo. App. 371, 75 Pac. 595.

178 Lentz v. Victor, 17 Cal. 271.

179 Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577.

180 Pico v. Colimas, 32 Cal. 578.

181 Richardson v. Smith, 29 Cal. 529; Richardson v. Hall, 21 Md. 399.

182 McDonald v. Prescott, 2 Nev. 109, 90 Am. Dec. 517.

183 McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115; Towdy v. Ellis, 22

of the allegations of the complaint.¹⁸⁴ A plea alleging a seizure for a forfeiture as a justification to an action of trespass should not only state the facts which are relied on to establish a forfeiture, but should also aver directly that by reason thereof the property became and actually was forfeited, and was seized as forfeited.¹⁸⁵ In an action for damages for trespass, under a mere denial, defendant may show that the article destroyed or injured was worthless.¹⁸⁶ A plea justifying the taking upon a writ of replevin must show the execution and delivery to him of the replevin bond and affidavit with the writ.¹⁸⁷ Seizure of property by an officer under a void attachment is a naked trespass as against a stranger who is in rightful possession thereof.¹⁸⁸ Likewise, a receiver and persons securing the appointment of a receiver wrongfully for a going and solvent corporation become, after the appointment is declared void, trespassers *ab initio*, and liable for damages caused by their wrongful acts.¹⁸⁹

FORMS IN TRESPASS.

§ 6591. Complaint for malicious injury, claiming increased damages under the statute.

Form No. 1764.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the defendant maliciously and wantonly destroyed certain ornamental trees, of the value of . . . dollars, the property of the plaintiff, growing upon his land [or as the case may be], at . . . [by barking or girdling them, or otherwise state nature of injury, if not totally destroyed], contrary to the form of the statute in such case made and provided.

[DEMAND OF JUDGMENT FOR TREBLE DAMAGES.]

Cal. 659; Knox v. Marshall, 19 Cal. 617; Killey v. Seannell, 12 Cal. 73.

¹⁸⁴ Glazer v. Clift, 10 Cal. 303.

¹⁸⁵ Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381.

¹⁸⁶ Dunlap v. Snyder, 17 Barb. 561.

¹⁸⁷ Morris v. Van Voast, 19 Wend. 283. As to distinction between such a writ and an execution, see Foster

v. Pettibone, 20 Barb. 350; disproving Stimpson v. Reynolds, 14 Barb. 506.

¹⁸⁸ Hagar v. Haas, 66 Kan. 333, 71 Pac. 822; Cook v. Higgins, 66 Kan. 762, 71 Pac. 259.

¹⁸⁹ Thornton-Thomas Merc. Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; Bowman v. Hazen, 69 Kan. 682, 77 Pac. 589.

§ 6592. Complaint for damages for injuring trees.

Form No. 1765.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the . . . day of . . . , 19.., entered upon the land of the plaintiff, in the county of . . . , the same being then in the possession of the plaintiff, and did, without the leave of the plaintiff, cut down . . . trees [designate number and kind of trees], of the value of . . . dollars; whereby the plaintiff lost said trees, and the land belonging to the plaintiff was greatly damaged and lessened in value, to the amount of . . . dollars; and thereby the defendant, by the force of section . . . of the statute of . . . , forfeited and became liable to pay to the plaintiff treble the amount of said damages.

[DEMAND OF JUDGMENT.]

§ 6593. Complaint for cutting and converting timber.

Form No. 1766.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant forcibly broke and entered upon plaintiff's land [the same being then in possession of the plaintiff], and there cut down and carried away the trees and timber of the plaintiff, of the value of . . . dollars, and converted and disposed of the same to his own use, contrary to the statute, [etc.,] to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6594. Complaint for treading down grain.

Form No. 1767.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant entered upon the plaintiff's lot [or farm], known as . . . , and trod down the grain then growing thereon, and cut down certain trees [or as the case may be], contrary to the statute, [etc.,] to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6595. Complaint for damage by trespassing cattle, under California statute of March 7, 1878.

Form No. 1768.

[TITLE.]

The plaintiff complains, and alleges:

I. That during all the times hereinafter mentioned he was, and now is, the owner, and lawfully in possession of all that certain real estate situated in . . . township, county of . . . , state of California, and described as follows: [Description.]

II. That during all of the time between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., the defendant was the owner in possession of, and chargeable with the care of, certain animals, to-wit, sheep.

III. That at divers times between said last-mentioned dates said animals ran and trespassed upon said lands, ate up, injured, and destroyed the grain, hay, and verdure being and growing thereon.

IV. That in consequence of said animals so running, trespassing, eating up, injuring, and destroying the said grain, hay, and verdure which was then upon said land, plaintiff has been damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6596. Complaint for removal of fence.

Form No. 1769.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant forcibly broke and entered upon the plaintiff's land, and took down a fence standing upon said land and removed the same, and also then and there erected another fence on said land, and also then and there disturbed the plaintiff in the use and occupation of said land, and prevented him from enjoying the same as he otherwise would have done, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6597. Complaint for trespass on chattels.

Form No. 1770.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant unlawfully took from the possession of the plaintiff, and carried away [describe the goods], the property of the plaintiff, and still unlawfully detains the same from the plaintiff [or where the possession of the property was regained: and unlawfully detained the same from the plaintiff for the space of . . . days], to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6598. Averment of special damage.

Form No. 1771.

That by reason of such unlawful taking and detention of said property, the plaintiff was compelled to pay, and did, on the . . . day of . . . , 19.., at . . . , pay, . . . dollars to procure the return of the same, and also . . . dollars for storage, and sustained other injury.

§ 6599. Complaint for malicious injury to property.

Form No. 1772.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant, willfully and maliciously intending to injure the plaintiff, cut, broke, and mutilated certain [designate what], the property of the plaintiff, of the value of . . . dollars, and greatly injured them, so that the plaintiff was compelled to expend . . . dollars in repairing the same, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6600. Complaint for entering and injuring house and goods therein.

Form No. 1773.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant, A. B., entered into the plaintiff's house, No. . . . street, in the city of . . . , in this state, and unlawfully broke and injured the doors and walls thereof [or other injury to house], and took and carried away [enumerate articles], the property of the plaintiff,

and converted and disposed of the same to his own use, to plaintiff's damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6601. Complaint for trespass by city officials while abating an alleged public nuisance.

Form No. 1774.

[TITLE.]

The plaintiff complains, and alleges:

I. [Allege incorporation and existence of the defendant city.]

II. That on the . . . day of . . . , 19.., and upon sundry other days and times of day, and before the commencement of this action, the defendant unlawfully entered upon the lands and premises of the plaintiff, lying and being in the said city of . . . , described as follows: [give description], and dug up and carried away . . . thousand cubic feet of earth, and thereby destroyed about six thousand surface square feet of said lot, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6602. To restrain repeated trespass, resulting in multiplicity of suits

Form No. 1775.

[TITLE.]

The plaintiff complains, and alleges:

I. That at and for many years prior to the times hereinafter stated, the plaintiff was, and still is, the owner and in possession of the following-described parcel of land: [describe same], and has maintained, and still does maintain, a dwelling-house upon the said lands, standing within . . . feet of the west boundary line thereof.

II. That some time in the month of . . . , 19 . . . , the defendant, without the consent of the plaintiff, forcibly entered upon the said parcel of land, and constructed a fence along the entire east side of said parcel, and within two feet of the plaintiff's said dwelling-house, and thereby cut off from the plaintiff's said premises a strip of land . . . feet in width, comprising a part of his dooryard, and also cut off the plaintiff from egress from his said premises to . . . street, a public highway in said city, and entirely excluded the plaintiff from the use of said strip of land; that the plaintiff immediately removed the said fence so con-

structed by the defendant. [If the defendant reconstructed the fence and committed further trespasses, set them forth.]

III. That the said defendant threatens and asserts that he will reconstruct said fence at the place aforesaid as often as the plaintiff removes the same, and will construct a building partially upon the said strip of land, and thus permanently deprive the plaintiff of the use and enjoyment thereof, and the plaintiff fears that the said defendant will carry out his said threats unless restrained by the judgment of this court, and that if the defendant does continue said trespass he will put the plaintiff to irreparable injury, and will harass, vex, and annoy the plaintiff, and will put him to the necessity of bringing a multiplicity of actions to protect his rights.

Wherefore, plaintiff demands judgment that the said defendant, his agents and attorneys, and all persons claiming by or under him subsequent to the filing of a notice of the pendency of this action, be perpetually enjoined, and restrained from taking possession of, or attempting to take possession of, the said strip of land, and from placing any obstruction thereon, or in any manner interfering with the use and occupation thereof by the plaintiff; and that the plaintiff have such other and further relief as may be equitable, together with the costs of this action.

§ 6603. Trespass on land—Denial of plaintiff's title.

Form No. 1776.

[TITLE.]

The defendant answers to the complaint:

That the said dwelling-house [or land] was not the plaintiff's, as alleged, or at all.

§ 6604. Denial of plaintiff's possession.

Form No. 1777.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not possessed of the lands mentioned in the complaint, or any part thereof.

§ 6605. Justifying trespass—Fences defective.

Form No. 1778.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the plaintiff and defendant occupy farms contiguous to each other, and separated by a fence which the plaintiff was bound to keep in repair. The plaintiff neglected to keep the fence in repair, by means whereof the cattle of the defendant escaped over the fence and onto the premises of the plaintiff, and thereby the defendant committed, by his cattle, and without his fault, the supposed injury set forth in the complaint as done by the defendant's cattle.

II. That the defendant, as soon as he had notice of the escape of his cattle, entered upon the plaintiff's premises to, and did, drive them out, doing no unnecessary damage, which is the alleged trespass committed by the defendant, and set forth in the complaint.

§ 6606. Justification of trespass to retake property.

Form No. 1779.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That on or about the . . . day of . . . , 19.., the plaintiff wrongfully took from the defendant's possession a horse [or other property, describing the same], which was then, and still is, the property of the defendant, and placed the same upon the plaintiff's said premises, and wrongfully refused to deliver the same to the defendant, though defendant frequently demanded the return thereof.

II. That thereupon this defendant entered upon the plaintiff's said premises, and retook said horse, and drove the same away, doing no unnecessary damage, which are the acts complained of in the plaintiff's said complaint.

§ 6607. Justification of rebuilding fence.

Form No. 1780.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That the fence mentioned in the complaint was a part of the division fence upon the line between the lands of the plaintiff and of the defendant, which, by a previous agreement between them, the defendant was bound to make and keep in repair.

II. That he took up and removed the part of said fence which he was bound to repair, and replaced the same with a new fence

upon the said division line, and with as little injury as possible to the plaintiff's crops, as he had full right to do, which are the acts complained of.

§ 6608. Leave and license.

Form No. 1781.

[TITLE.]

The defendant answers to the complaint:

That the acts complained of were done with leave of plaintiff.

§ 6609. Trespass on chattels—Denial of right of possession.

Form No. 1782.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not entitled to the possession of the goods mentioned in the complaint.

§ 6610. The same—Denial of breaking.

Form No. 1783.

[TITLE.]

The defendant answers to the complaint:

That the defendant did not break nor enter the premises of the plaintiff as alleged, or in any other manner.

§ 6611. The same—Denial of taking.

Form No. 1784.

[TITLE.]

The defendant answers to the complaint:

That he did not take nor carry away said goods as alleged, or at all.

§ 6612. Justifying trespass, by virtue of requisition of claim and delivery.

Form No. 1785.

[TITLE.]

The defendant answers to the complaint:

I. That at the time mentioned in the complaint the defendant was sheriff of the county of . . . , in this state, duly elected and qualified as such.

II. That in an action brought by one M. N. against one O. P., in the court of . . . , to recover the possession [among other things] of the property mentioned in the complaint in this action, said M. N. delivered to this defendant an affidavit made by him [or made in his behalf], and a notice indorsed thereon, describing the property mentioned in the complaint, and requiring this defendant to take the same from said O. P., and deliver it to said M. N.; and at the same time delivered to this defendant, as such sheriff, a written undertaking as required by law in such case, of which affidavit, notice, and undertaking copies are hereto annexed as a part of this answer.

III. That by virtue of said proceedings the defendant took and detained the goods mentioned in the complaint, which are the acts of which the plaintiff complains.

§ 6613. Justification under execution.

Form No. 1786.

[TITLE.]

The defendant answers to the complaint:

I. That at the time mentioned in the complaint the defendant was sheriff of the county of . . . , in this state, duly elected and qualified as such.

II. That heretofore, in an action in [state the court], wherein A. B. was plaintiff, and C. D., the plaintiff herein, was defendant, judgment was, on the . . . day of . . . , 19.., rendered in favor of the said A. B., plaintiff in said action, against the said C. D., defendant therein, for the sum of . . . dollars, as by the judgment-roll in said action, on file in the office of the county clerk, more fully appears.

III. That afterwards, on the . . . day of . . . , 19.., execution against the property of C. D., based upon such judgment, was issued, and directed to and delivered to this defendant, as sheriff of the said city and county of . . . , for service, whereby, after containing the statement and recital of the matters by law required to be stated and set forth in such case, and after setting forth that the sum of . . . dollars was then actually due on the said judgment, this defendant was in substance commanded to satisfy the said judgment out of the personal property of the said judgment debtor within this defendant's county; or if sufficient personal property could not be found, then out of the real property in this county belonging to such judgment debtor, and to

return the said execution within sixty days after its receipt by him, as required by law.

IV. That under and by virtue of the said execution this defendant, as sheriff of the city and county of . . . , and not otherwise, levied upon certain goods and chattels, of the character and description of those mentioned and described in the complaint, and took the same into his custody, which defendant believes to be the goods and chattels referred to in the complaint, and that the said levy and taking and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged.

V. And this defendant, upon his information and belief, avers that the goods levied on as aforesaid were at the time of said levy the property of the said C. D.

§ 6614. Justification of breaking in plaintiff's house by virtue of search warrant.

Form No. 1787.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That at the time mentioned in the complaint, one A. B. was a justice of the peace of the town of . . . , in the county of . . . , and was authorized to issue, and did issue, a warrant in writing, under his hand and seal, directed to any constable of the said township reciting that whereas information on oath had been given to him, the said A. B., a justice of the peace as aforesaid, by one C. D., of . . . , that [specify the goods] had lately been feloniously taken and carried away by E. F., from [etc.], and that the said [goods], or a part thereof, were then concealed in a cellar of L. M., at . . . ; and the said justice did, in and by said warrant, in the name of the people of this state, command and authorize them, the said constables, or any of them, with proper assistance, in the daytime, to enter into the cellar of the said L. M., at . . . , and there diligently search for the said [goods], and if the same or any part thereof should be found, then the said constables were, in and by the said warrant, likewise commanded to bring the same so found, together with the said L. M., or the person in whose custody the same should be found, before him, the said justice, or some other justice of the peace of said town [etc.], to be dealt with as the law directs.

II. That said warrant was delivered to G. H., one of the defendants, who then was one of the constables of the said township,

to be executed according to law, by virtue of which he went to the cellar of the said L. M. mentioned in the warrant, and which was part and parcel of and belonged to the dwelling-house mentioned in the complaint, and there, finding the door thereof shut and fastened, did, in a friendly and peaceable manner, demand and require that the said door should be opened, which was then and there refused; and that thereupon the said G. H., one of the defendants, in order to execute the said warrant, did break open the said door, doing as little damage as possible, and did search there for said [goods], and took and carried away therefrom [specify the goods], being part of the said [goods] mentioned in the said warrant, and brought the same before the said justice, as he might lawfully do, which are the acts of which the plaintiff complains.

§ 6615. Judgment in trespass for cutting timber where defendant claims cutting was by mistake.

Form No. 1788.

[TITLE.]

The issues arising in this action having been tried by the court and a jury, and the jury having returned their verdict, in which they find [here recite verdict], and it appearing from said verdict that such cutting was not done by mistake:

Now, on motion of G. H., attorney for the plaintiff,—

It is adjudged, that the plaintiff do have and recover of the defendant, C. D., the sum of . . . dollars [highest market value of logs or lumber manufactured therefrom while in defendant's possession, with interest], together with the costs of this action, taxed at . . . dollars, amounting in all to the sum of . . . dollars.

J. K., Judge of said . . . Court.

CHAPTER CXLIX.

WASTE.

§ 6616. **Waste defined.**—"Waste," says Mr. Justice Blackstone, "is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail."¹ It is waste to cut timber-trees and sell them in exchange for fire-wood, but not to use for posts on the premises.² In this country no act of a tenant constitutes waste, unless it is or may be prejudicial to the inheritance, or to those who are entitled to the reversion or remainder.³ To constitute waste, the injury to real property must be of a permanent character, some unauthorized act of the tenant which does a lasting injury, or tends to destroy its identity.⁴

It is not waste for the person in possession of property sold under execution, at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use it in the ordinary course of husbandry; or to make necessary repairs; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family, while he occupies the property.⁵

§ 6617. **Allegation of tenancy.**—In an action to recover for waste, the plaintiff must show that he is entitled to an immediate estate of inheritance, although he need not set out his title particularly.⁶ If the action is against a tenant for life or years, the complaint must show a seisin in the plaintiff, and a demise to the defendant;⁷ and an allegation that the defendants held certain

¹ Sedgwick on Damages, 146. See, also, the common law with regard to waste, expounded by Lord Chief Justice Eyre, in *Jefferson v. Bishop of Dunham*, 1 Bos. & Pul. 120, and *Story's Equity Jurisprudence*, § 909.

² *Padelford v. Padelford*, 7 Pick. 152. See, also, *Clark v. Holden*, 7 Gray, 8, 66 Am. Dec. 450; *Cannon v. Barry*, 59 Miss. 289.

³ *Pyncheon v. Stearns*, 11 Metc. (Mass.) 304, 45 Am. Dec. 207.

⁴ *Davenport v. Magoon*, 13 Or. 3, 57 Am. Rep. 1, 4 Pac. 299; *Stewart v. Wood*, 48 Ill. App. 378.

⁵ Cal. Code Civ. Proc., § 706.

⁶ *Greenly v. Hall*, 3 Harr. (Del.) 9; *Adams v. Slattery*, 36 Colo. 35, 85 Pac. 87.

⁷ *Carris v. Ingalls*, 12 Wend. 70.

premises as tenants thereof to the plaintiff, under a demise to them for a certain rent, imports a tenancy for a term, and not a tenancy at will.⁸ Under an averment of wrongful waste, a recovery may be had for negligent waste.⁹

§ 6618. **Growing timber—Common-law doctrine.**—Although the common-law doctrine of waste is not strictly applicable in this country, yet such cutting of trees or timber as will work a permanent injury to the freehold or inheritance, in the absence of any specific leave or license to cut such trees or timber, is waste, for which an action will lie in equity, for the prevention of such injury by injunction before it is committed, or at law, for the recovery of damages by the remainderman, after the injury is done.¹⁰ It has been held, however, that the statutes of Marlebridge and Gloucester concerning waste are a part of the common law, brought to this country from England.¹¹ Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it into whosoever hand it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property, to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value, as upon an implied contract of sale.¹²

§ 6619. **Injunction, when lies.**—The owner of a contingent estate may enjoin waste when he cannot recover for waste already committed by removal of rock from the premises, since he has no vested interest in the rock removed.¹³ Cutting, destroying, or removing growing timber is sufficient ground for an injunction,

⁸ *Parrott v. Barney*, Deady's Rep. 405, Fed. Cas. No. 10773a.

⁹ *Robinson v. Wheeler*, 25 N. Y. 252.

¹⁰ *McCay v. Wait*, 51 Barb. 225.
^{See} *Calvert v. Rice*, 91 Ky. 533, 34 Am. St. Rep. 240, 16 S. W. 351;

Crothers v. Acock, 43 Mo. App. 318.

¹¹ *Parrott v. Barney*, Deady's Rep. 405, Fed. Cas. No. 10773a.

¹² *Halleck v. Mixer*, 16 Cal. 574.

¹³ *Pavkovich v. Southern Pacific Ry. Co.*, 150 Cal. 39, 87 Pac. 1097.

without any allegation of insolvency.¹⁴ A purchaser of standing timber cannot obtain an injunction to stay waste committed by the cutting of the timber—1. Because as to him the cutting of the timber is no waste, neither the remainder in fee simple nor in fee tail being vested in him; 2. Because, being a mere purchaser of the timber, he has adequate relief at law, if it does not appear that the defendants are irresponsible. An action to quiet title and to enjoin waste can be maintained on a complaint alleging plaintiff's ownership in fee, defendant's adverse claim of interest, for establishment of plaintiff's title, and for an injunction.¹⁵

The commission of waste may be restrained, by order of court, granted with or without notice, until the expiration of the period for redemption of property sold under execution, the order being granted upon application of the purchaser or the judgment creditor,¹⁶ likewise, upon good cause shown, pending foreclosure.¹⁷

§ 6620. Jurisdiction.—A court of equity has no jurisdiction to enjoin trespass and waste in a mine located in a foreign jurisdiction, even though the parties are both before the court.¹⁸

§ 6621. When action lies.—The action for waste lies, even after assignment of the reversion.¹⁹ An action of waste is not maintainable against a tenant by *elegit*, on the principles of the common law.²⁰ The action may be maintained under section 732 of the California Code of Civil Procedure, for commissive or permissive waste. But a tenant at will is not liable; though if he commit voluntary waste he is liable, not as tenant, but as a trespasser; and for permissive waste, as for failure to keep premises in repair, he was never liable.²¹

§ 6622. When injunction will not be dissolved.—An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute; especially

¹⁴ *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544; *Silva v. Garcia*, 65 Cal. 591, 4 Pac. 628; *Duncombe v. Felt*, 81 Mich. 333, 45 N. W. 1004.

¹⁵ *Marques v. Maxwell Land Grant Co.*, 12 N. Mex. 445, 78 Pac. 40; N. Mex. Comp. Laws, § 4010.

¹⁶ Cal. Code Civ. Proc., § 706.

¹⁷ Cal. Code Civ. Proc., § 745.

¹⁸ *Lindsley v. Union Silver Star Min. Co.*, 26 Wash. 301, 66 Pac. 382. ¹⁹ *Robinson v. Wheeler*, 25 N. Y. 252.

²⁰ 1 Co. Lit. 54; 3 Co., part 6, 37; *Scott v. Lenox*, 2 Brock. Marsh. 57, Fed. Cas. No. 12538.

²¹ *Parrott v. Barney*, *Deady's Rep.* 405, Fed. Cas. No. 10773a.

where the plaintiff's bond will fully protect them for any delay, if it should turn out that they have any right.²²

§ 6623. *Mortgaged land.*—No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.²³ Where the principal value of the land mortgaged consists of timber, the mortgagee may restrain the mortgagor from cutting the same, though it would take ten years to remove all the timber, not more than one tenth would be removed before maturity of the mortgage debt, and though valuable improvements were placed upon the land subsequent to the execution of the mortgage, for the purpose of cutting timber.²⁴

§ 6624. *Mining claims.*—The working of a mine is waste;²⁵ likewise, the unauthorized removal of oil.²⁶ The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass for which injunctions are now universally granted,²⁷ when the injury threatens to be continuous and irreparable.²⁸ It is no objection to an injunction in such case that the party may possibly recover what others may deem an equivalent in money.²⁹ Where a ditch has been excavated from the bed of a stream, and its water has been diverted through the same for mining purposes, a miner has no right to work a claim located above its head, after the ditch is dug, so as to mingle mud and sediment with the water, and injure the ditch, or fill it up, and lessen its capacity.³⁰ One of several tenants in common of a mine who does not exclude his cotenants may work the mine in the usual way, and extract ore therefrom, without being chargeable with waste, or liable to the other cotenants for damages, and an injunction will not be granted at their instance to prevent the working of the mine.³¹

²² Buckalew v. Estell, 5 Cal. 108.

²³ Cal. Civ. Code, § 2929.

²⁴ Beaver Flume etc. Co. v. Eccles, 43 Or. 400, 99 Am. St. Rep. 759, 73 Pac. 201.

²⁵ United States v. Parrott, 1 McAll. 271, Fed. Cas. No. 15998. See Gaines v. Mining Co., 32 N. J. Eq. 86.

²⁶ Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 Pac. 317.

²⁷ Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262. See, also,

Henshaw v. Clark, 14 Cal. 465; Logan v. Driscoll, 19 Cal. 623, 81 Am. Dec. 90; McLaughlin v. Kelly, 22 Cal. 212; People v. Morrill, 26 Cal. 337; More v. Massini, 32 Cal. 595; Hess v. Winder, 34 Cal. 270; Willard's Equity Jurisprudence, 370.

²⁸ Merced Min. Co. v. Fremont, 7 Cal. 317, 68 Am. Dec. 262; Hill v. Taylor, 22 Cal. 191.

²⁹ Hicks v. Michael, 15 Cal. 107.

³⁰ Hill v. Smith, 27 Cal. 476.

³¹ McCord v. Oakland etc. Min. Co.,

§ 6625. **Parties.**—The action for waste may be maintained against a guardian, tenant for life or years, joint tenant, or tenant in common of real property. It may be maintained by any person aggrieved.³² A grantee is entitled to the same remedies for recovery for non-performance of any of the terms of the lease or for any waste or cause of forfeiture, as his grantor or devisor might have had.³³ In Wisconsin, it has been held that, under their statute, the action could only be maintained where there is a privity of estate; and that the doctrine of relation could only be applied for the protection of persons standing in some privity with the party who institutes the proceedings for the land and acquires an equitable claim or right to the title, and would not aid plaintiff in maintaining an action for waste.³⁴ A tenant in possession, under a lease containing a clause conferring upon him the privilege of purchasing the demised premises, having failed to exercise such privilege within the time allowed, is liable for waste committed on the premises during his possession.³⁵ And equity may interfere and cancel a lease to prevent irreparable waste by tenants.³⁶ A contingent remainderman, before the contingency happens, may maintain an injunction to restrain waste by the life tenant.³⁷

§ 6626. **Removal of building.**—An injunction will not be granted at the suit of the landlord, against the tenant or his assigns, to restrain the commission of waste by the removal from the demised premises of a building erected by the tenant, if it appears that the landlord is not entitled to the reversion.³⁸ But where the landlord is entitled to the reversion, the tearing down or destruction of the demised buildings by a tenant, unless authorized by the terms of the lease, is waste, and, if threatened, will be restrained by injunction. And a provision in a lease authorizing a tenant to alter and repair, does not authorize him to tear down or destroy.³⁹ But it is not waste in a tenant for

64 Cal. 134, 49 Am. Rep. 686, 27 Pac. 863.

32 Cal. Code Civ. Proc., § 732.

33 Cal. Civ. Code, § 821.

34 Whitney v. Morrow, 34 Wis. 644.

35 Powell v. Dayton etc. R. R. Co., 16 Or. 33, 8 Am. St. Rep. 256, 16 Pac. 863. See Regan v. Luthy, 11 N. Y. Supp. 709.

36 Anderson v. Hammon, 19 Or. 446, 20 Am. St. Rep. 832, 24 Pac. 228.

37 University v. Tucker, 31 W. Va. 621, 8 S. E. 410. See Lawry v. Lawry, 88 Me. 482, 34 Atl. 273.

38 Perrine v. Marsden, 34 Cal. 14.

39 Davenport v. Magoon, 3 West Coast Rep. 328.

life to cut down timber-trees for the purpose of making necessary repairs on the estate, and to sell them and purchase boards with the proceeds, provided it is the most economical mode.⁴⁰

§ 6627. **Treble damages.**—The statutes of nearly all the states, including California, provide that in an action for waste the judgment may be for treble damages,⁴¹ but not more than actual value for uncultivated timber taken for repair of a public highway.⁴² At common law there is no forfeiture of estate for years for the commission of waste, but it was made so by statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to treble damages.⁴³ If the court refuse to treble the damages, the remedy is on appeal, and not by *mandamus*.⁴⁴ But the general rule is that the sound discretion of the trial court will not be interfered with. In order to justify treble damages, there must be a willful waste.⁴⁵ When treble damages are given by statute, it must be expressly inserted, and conclude, to the damage of the plaintiff, against the statute.⁴⁶ This rule, however, does not apply to justices' courts.⁴⁷

§ 6628. **Damages.**—The owner of a contingent estate may enjoin further waste by removing rock, but, having no vested interest in the rock removed, he cannot recover damage therefor.⁴⁸ Damages for the detriment to the land as well as the buildings may be had.⁴⁹ The purchaser at execution sale, or his successor in interest, may have damages for waste committed after the date of the sale, and before possession is delivered under the sheriff's deed.⁵⁰

§ 6629. **Limitations.**—Under a lease containing a clause for the purchase of the demised premises within a specified time, the statute of limitations does not commence to run against an action

⁴⁰ *Loomis v. Wilbur*, 5 Mason, 13, Fed. Cas. No. 8498.

⁴¹ Cal. Code Civ. Proc., §§ 732, 733.

⁴² Cal. Code Civ. Proc., § 734.

⁴³ *Chipman v. Emeric*, 3 Cal. 283.

⁴⁴ *Early v. Mannix*, 15 Cal. 149.

⁴⁵ *Isom v. Rex Crude Oil Co.*, 140 Cal. 673, 74 Pac. 294.

⁴⁶ *Chipman v. Emeric*, 5 Cal. 239.

But see contra, *Robinson v. Kinne*, 1 N. Y. Sup. Ct. 60; *Carris v. Ingalls*, 12 Wend. 70.

⁴⁷ *O'Callaghan v. Booth*, 6 Cal. 63.

⁴⁸ *Pavkovich v. Southern Pacific Ry. Co.*, 150 Cal. 39, 87 Pac. 1097.

⁴⁹ *Erbes v. Smith*, 35 Mont. 38, 88 Pac. 568.

⁵⁰ Cal. Code Civ. Proc., § 746.

for waste until the privilege is extinguished by lapse of time. In such action for waste committed by such tenant, it is no bar to plead that the landlord had brought an action for the purchase price stipulated in the lease, which action was dismissed because the plaintiff therein failed to show a compliance with the contract on his part, by a tender of the deed at the proper time, the remedies not being concurrent.⁵¹

§ 6630. **Undertaking on appeal.**—An undertaking in a sum fixed by the court against waste and the value of the use and occupation of the premises must be given, in case of appeal from a judgment directing the possession or sale of real property.⁵²

FORMS—WASTE.

§ 6631. **Complaint by lessor—Waste by lessee.**

Form No. 1789.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the defendant rented from him the house No. . . . street, San Francisco, for the term of . . . months.

II. That the defendant occupied the said premises during said term of rental.

III. That during the period of such occupation the defendant greatly injured the premises [state how], to the damage of the plaintiff in the sum of . . . dollars, against the form of the statute.

Wherefore plaintiff demands judgment for . . . dollars damage.

§ 6632. **Complaint by purchaser at sheriff's sale—For waste, intermediate sale, and delivery of possession.**

Form No. 1790.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., one A. B. was the owner in fee of the following-described premises: [Description of premises.]

⁵¹ Powell v. Dayton etc. R. R. Co.,
16 Or. 33, 8 Am. St. Rep. 251, 16
Pac. 863.

⁵² Cal. Code Civ. Proc., § 945. As
to undertaking in justices' courts,
see Cal. Code Civ. Proc., § 978.

II. That the said premises were at the time subject to the lien of a judgment recovered by one C. D. against E. F., in an action in the superior court of the county of . . . , in this state, which judgment was docketed in said county [or, state the county], and that the sheriff of said county, by virtue of an execution issued thereon, sold the same.

III. That at such sale the plaintiff became a purchaser, and the sheriff executed and delivered to him a certificate of the said sale, and on the . . . day of . . . , 19.., and before this action, executed and delivered to plaintiff a deed of the premises pursuant to the said sale thereof, and the plaintiff paid the purchase money therefor.

IV. That intermediate the sale and delivery of the deed, the defendant being in possession [allege act of waste and damage, against the form of the statute].

[DEMAND OF JUDGMENT.]

§ 6633. The same—By redemptioner.

Form No. 1791.

[TITLE.]

The plaintiff complains, and alleges:

I and II. [As in preceding form.]

III. That at such sale the defendant became the purchaser, and the sheriff executed and delivered to him a certificate of the sale thereof.

IV. That afterwards, and before the expiration of twelve months, the plaintiff redeemed the same from said sale by paying the necessary amount therefor, and on the . . . day of . . . , 19.., and before this action, the sheriff executed and delivered to the plaintiff a deed of the premises pursuant to the sale and redemption.

V. [Allege acts of waste intermediate sale and redemption, against the form of the statute.]

[DEMAND OF JUDGMENT.]

§ 6634. Complaint by remainderman—For forfeiture and eviction on account of waste.

Form No. 1792.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time of his death, one A. B. was seised in fee of [describe the premises].

II. That in his lifetime, the said A. B. made and published his last will and testament, whereby he devised the said land to the plaintiff, subject, however, to a devise made in the same will, of the same lands, to the defendant, for the term of

III. That on the . . . day of . . . , 19.., at . . . , the said A. B. died.

IV. That the defendant entered into possession of the same under the said will.

V. That on the . . . day of . . . , 19.., the defendant committed great waste on the said land [state acts of waste].

VI. That the injury thereby done to the said property, and the estate of the plaintiff therein, is more than equal to the value of the defendant's unexpired term.

Wherefore the plaintiff demands judgment:

1. That the estate of the defendant in the said property be forfeited.

2. That he be evicted therefrom.

3. For . . . dollars damage.

§ 6635. Answer—Denial of waste.

Form No. 1793.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That defendant is not guilty of the waste and destruction aforesaid, in manner and form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

II. That defendant does not hold the said premises under and as tenant to the said plaintiff, in manner and form as the plaintiff in his complaint hath alleged, or at all.

III. That the said . . . did not demise the said premises to the said . . . , in manner and form as the said plaintiff hath in his said complaint alleged, or in any manner, or at all.

CHAPTER CL.

FOR USE AND OCCUPATION.

§ 6636. **Summary proceedings to recover possession.**—It seems that where a landlord elects to terminate a lease for non-payment of rent, and commences summary proceedings to recover possession, he is not entitled to recover for use and occupation from the time he terminated the lease until he obtained possession.¹ The action for use and occupation cannot be maintained unless the relation of landlord and tenant has existed.²

§ 6637. **Occupancy.**—Actual continued occupancy is not necessary to be shown.³ In Kansas, in an action for rent, based wholly upon quasi-contract arising by operation of law from occupation of the premises, recovery cannot be had for more than three years prior to the commencement of the action.⁴

§ 6638. **Jurisdiction.**—Justices' and superior courts have concurrent jurisdiction, in California, in cases of forcible entry and forcible or unlawful detainer, when the rental value does not exceed twenty-five dollars per month, and when the whole amount of damages claimed does not exceed two hundred dollars.⁵

§ 6639. **Damages.**—Damages for use and occupation when the occupation is without color of title will not prevent recovery, and the rental value for the time the owner is unlawfully kept out of possession is the proper measure.⁶

Where land is deeded upon covenant to be used for certain purposes and no other, and the contract is of a personal nature, subsequent grantees of the land cannot be restrained, nor liable

1 Powers v. Witty, 42 How. Pr. 352, 4 Daly, 552.

2 Hennessey v. Hoag, 16 Colo. 460, 27 Pac. 1061; Coit v. Planer, 51 N. Y. 647; Preston v. Hawley, 101 N. Y. 586, 5 N. E. 770; Grady v. Ibach, 94 Ala. 152, 10 South. 287.

3 Little v. Martin, 3 Wend. 220, 20

Am. Dec. 688; Westlake v. De Graw, 25 Wend. 669; Hoffman v. Delihanty, 13 Abb. Pr. 388.

4 Story v. McCormick, 70 Kan. 323, 78 Pac. 819.

5 Cal. Code C'v. Proc., § 1163.

6 Long-Bell Lumber Co. v. Martin, 11 Okla. 192, 66 Pac. 328.

in damages, unless the use made of the property materially injures the remaining property of the plaintiff.⁷

§ 6640. **Parties.**—Where parties own tracts in severalty, they cannot join in an action to recover for the use and occupation of the entire tract.⁸

§ 6641. **Designation of premises.**—The premises may be designated by a simple reference to the lease.⁹ Where there are no writings, it is sufficient if the premises can be ascertained and located from the allegations of the complaint.¹⁰

§ 6642. **Forfeiture.**—The tenant cannot insist that his own act amounted to a forfeiture; if he could, the consequence would be that in every instance of an action of covenant for rent brought on a lease containing a provision that it should be void on the non-performance of the covenants the landlord would be defeated by a tenant showing his own default at a prior period, which made the lease void.¹¹ At common law there was no forfeiture of an estate for years for the non-payment of rent.¹² By failure to pay rent when demanded, the contract under the lease is determined, and possession from that time is tortious.¹³ But the mere failure to pay will not make a forfeiture; a formal demand on the day it becomes due is necessary.¹⁴ Where the record shows no demand of rent, there can be no forfeiture.¹⁵

§ 6643. **Liability of tenant.**—The tenant is liable to payment until he has restored full and complete possession to the landlord, and his liability to pay the rent is not discharged by an eviction, unless under a title superior to the landlord, or by some agency of the landlord.¹⁶

⁷ Los Angeles Terminal Land Co. v. Muir, 136 Cal. 36, 68 Pac. 308.

⁸ Tennant v. Pfister, 51 Cal. 511. That one tenant in common cannot alone maintain an action for use and occupation, see Dorsett v. Gray, 98 Ind. 273.

⁹ Dundass v. Lord Wymouth, Cowp. 665; Van Rensselaer v. Bradley, 3 Denio, 135, 45 Am. Dec. 451.

¹⁰ Kiernan v. Terry, 26 Or. 494, 38

Pac. 671. See Gustaveson v. Otis, 27 N. Y. Supp. 280.

¹¹ Doe d. Bryan v. Banks, 4 Barn. & Ald. 409; Stuyvesant v. Davis, 9 Paige, 427; Canfield v. Westcott, 5 Cow. 270.

¹² Chipman v. Emeric, 3 Cal. 273.

¹³ Treat v. Liddell, 10 Cal. 302.

¹⁴ Gaskill v. Trainer, 3 Cal. 334.

¹⁵ Chipman v. Emeric, 3 Cal. 273.

¹⁶ Schilling v. Holmes, 23 Cal. 227.

§ 6644. **Term of lease.**—If the tenant takes a receipt from his landlord, specifying the amount of rent paid, and the length of the term, to commence on the expiration of the lease, the new term will be for the time specified in the receipt. No new tenancy by implication arises in such cases.¹⁷ Where a landlord served upon his tenant, who was occupying under him certain premises under a rent of two hundred and fifty dollars per month, a notice to quit, but before the time at which, by the effect of the notice, the tenancy would have terminated, the tenant, through a third person, proposed to the landlord to continue his occupancy, at a rent of three hundred dollars, with which proposal the landlord expressed himself satisfied, but did not in terms notify the tenant of his acceptance of it, and he continued to occupy the premises, it was held, in an action by the landlord for rent at the rate of three hundred dollars per month, that it must be inferred that the subsequent occupation of the tenant was with the consent of the landlord, on the basis of the proposal, rather than as a trespasser, and that plaintiff was entitled to recover.¹⁸

§ 6645. **Surrender of premises.**—One of the most important duties of the tenant is to peaceably surrender the premises as soon as the tenancy has expired.¹⁹ The surrender of a leasehold estate is the merger of the fee, but this will not defeat the rights of a third party intervening before the merger took effect.²⁰ Defendant is not entitled to a reduction of the amount of rent because plaintiff occupied the premises a part of the time in order to protect the property, it not being shown that the occupation was profitable to plaintiff.²¹

§ 6646. **Waiver of forfeiture.**—The subsequent receipt of the rent by the lessor is a waiver of the forfeiture unless the contract has a continuing covenant, or the lessor was ignorant of the breach.²² The forfeiture of a lease is not waived by the lessor allowing the tenant to hold over, without notice to quit, unless the circumstances show a new term created.²³

¹⁷ *Blumenberg v. Myres*, 32 Cal. 93, 91 Am. Dec. 560.

¹⁸ *Hoff v. Baum*, 21 Cal. 120.

¹⁹ *Schilling v. Holmes*, 23 Cal. 227.

²⁰ *Gaskill v. Trainer*, 3 Cal. 334.

²¹ *Fitzhugh v. Baird*, 134 Cal. 570, 66 Pac. 723.

²² *McGlynn v. Moore*, 25 Cal. 384.

²³ *Calderwood v. Brooks*, 28 Cal. 151.

§ 6647. **Assignment.**—The assignment may be alleged by naming a day during the term of the lease, before breach, and stating that all estate and interest of the lessor was then assigned to the defendant, who thereupon entered into possession of the premises.²⁴

§ 6648. **Liability of assignee.**—A party remaining in possession of realty after personal notice that he will be charged a certain rent becomes liable for such rent, although he is acting as the mere agent of the party who formerly leased the premises.²⁵ The liability of an assignee is confined to the term during which he holds the premises, by himself or his immediate tenants.²⁶ The assignee of a lease may discharge himself from all liability under the covenants of a lease by assigning over; and the assignment over may be to a beggar, a *feme covert*, or a person on the eve of quitting the country forever, providing the assignment be executed before his departure, and even though a premium is given as an inducement to accept the transfer.²⁷

§ 6649. **Non-payment.**—It is sufficient to aver that the defendant has not paid the same.²⁸

§ 6650. **Assignments.**—In these actions, the complaint should specifically allege the assignments to the grantee, and the better plan is to annex a copy or copies (if there be several) to the complaint.²⁹ It should be alleged distinctly that there was a lease, that the defendant was lessee, and is sued for the rent.³⁰ The owner may recover for installments of rent falling due on a lease, taken up by one who has purchased the stock of goods and notified the owner that he had taken an assignment of the lease, the owner consenting, although the assignment is not in writing, as required by the lease and the statute of frauds.³¹

²⁴ Van Rensselaer v. Bradley, 3 Denio, 135, 45 Am. Dec. 451; Norton v. Vultee, 1 Hall, 427.

²⁵ Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440.

²⁶ Astor v. L'Amoreux, 4 Sandf. 524. As to the liability of one in possession without a valid assignment, see Carter v. Hammett, 12 Barb. 253; Ryerss v. Farwell, 9 Barb. 615.

²⁷ Johnson v. Sherman, 15 Cal.

287, 76 Am. Dec. 481; citing 2 Platt on Leases, 416.

²⁸ Dubois, Exrs. of, v. Van Orden, 6 Johns. 105; Van Rensselaer v. Bradley, 3 Denio, 135, 45 Am. Dec. 451; Holsman v. De Gray, 6 Abb. Pr. 79.

²⁹ Beardsley v. Knight, 4 Vt. 471.

³⁰ Willard v. Tillman, 2 Hill, 274.

³¹ Baker v. J. Maier etc., 140 Cal. 530, 74 Pac. 22.

§ 6651. **Executor and devisee.**—One who is both executor and devisee of the lessor may join a claim for rent subsequent to the decease of testator with a claim for damages for breach of covenant respecting personal property embraced in the lease.³²

§ 6652. **Request and permission.**—The allegation that the use and occupation of the lot in question was at the request of defendant, and by the permission of plaintiff, is the allegation of a contract, which the plaintiff is bound to establish to enable him to succeed.³³

§ 6653. **Terms stated.**—If a plaintiff in an action on a contract for the pasturage of cattle at a fixed price does not insert in his complaint any *quantum valebat* count, judgment must be for the stipulated sum, or for the defendant.³⁴ Defendant having alleged that he agreed to pay rent for a wharf only while using it, may show that he was not using it, but that another party was, by agreement with plaintiff.³⁵

§ 6654. **When action lies.**—No action for use and occupation will lie where possession is adverse and tortious, for there can be no implication of a contract.³⁶ The right to recover for use and occupation is founded alone upon contract;³⁷ or on an agreement by which the tenant, with permission of the owner, occupied the premises.³⁸ One who enters land under an executory contract to purchase does not thereby become the tenant of his vendor, and cannot be held for use and occupation, though the agreement is afterwards rescinded.³⁹ But in certain cases a contract may be implied.⁴⁰ And in an action for use and occupation upon an undertaking on appeal the defendants are estopped from denying that the defendant in the judgment was in possession at the time

32 *Armstrong v. Hall*, 17 How. Pr. 76.

33 *Sampson v. Schaeffer*, 3 Cal. 201.

34 *Seale v. Emerson*, 25 Cal. 293.

35 *Ladd v. Hawkes*, 41 Or. 247, 68 Pac. 422.

36 *Sampson v. Schaeffer*, 3 Cal. 196; *Ramirez v. Murray*, 5 Cal. 222. See *Hurley v. Lamoreaux*, 29 Minn. 138, 12 N. W. 447; *Stringfellow v. Curry*, 76 Ala. 394.

37 *O'Connor v. Corbett*, 3 Cal. 370;

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Espy v. Fanton, 5 Or. 423; *Lankford v. Green*, 52 Ala. 103.

38 *Atkins v. Humphrey*, 52 Eng. Com. L. 653; *Selby v. Browne*, 7 Q. B. 620, 63 Eng. Com. L. 620.

39 *Belger v. Sanchez*, 137 Cal. 614, 70 Pac. 738.

40 *Osgood v. Dewey*, 13 Johns. 240; *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377; *Porter v. Bleiler*, 17 Barb. 149; *Ryerss v. Farwell*, 9 Barb. 615.

he took his appeal and gave the undertaking.⁴¹ If the occupation was contrary to the owner's will, his action must be for damages.⁴² If the complaint shows that the occupation was a trespass, it is of course bad on demurrer.⁴³

§ 6655. **Essential allegations — Title — Indebtedness.** — The plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown.⁴⁴ In the absence of an express contract, there must be an allegation and evidence of the value of the use and occupation.⁴⁵ No tenancy can be implied under a party who has not the legal estate.⁴⁶ But it would appear that one occupying and paying rent to an apparent proprietor as his landlord cannot, when sued, allege that he has only the equitable estate.⁴⁷ An averment of use and occupation as tenant is a sufficient averment of indebtedness.⁴⁸ The plaintiff must show that the defendant used and occupied the premises by the permission of the plaintiff.⁴⁹ It seems that in this action plaintiff need not aver title, and the defendant cannot object to his title.⁵⁰

It is held that rent reserved in a written lease under seal cannot be recovered under a count in *assumpsit* for use and occupation.⁵¹ But it is settled otherwise in Michigan.⁵² Under the common counts, the plaintiff is not bound to prove a special contract in order to recover a reasonable price for the use and occupation of premises.⁵³ A complaint in an action for use and occupation which fails to allege any facts showing that the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of the alleged use and occupation, or any part thereof, fails to state a cause of action, and is demurrable.⁵⁴ So under a

⁴¹ *Murdock v. Brooks*, 38 Cal. 596.

⁴² *Smith v. Stewart*, 6 Johns. 46, 5 Am. Dec. 186; *Bancroft v. Wardwell*, 13 Johns. 489, 7 Am. Dec. 396; *Hall v. Southmayd*, 15 Barb. 32.

⁴³ *Hurd v. Miller*, 2 Hilt. 540.

⁴⁴ *Morris v. Niles*, 12 Abb. Pr. 103; *Waters v. Clark*, 22 How. Pr. 104.

⁴⁵ *Ambrose v. Hyde*, 145 Cal. 555, 79 Pac. 64.

⁴⁶ *Morgell v. Paul*, 2 Man. & R. 303.

⁴⁷ *Dolby v. Iles*, 11 Ad. & E. 335.

⁴⁸ *Walker v. Mauro*, 18 Mo. 564.

⁴⁹ *Sampson v. Schaeffer*, 3 Cal. 196; *Hathaway v. Ryan*, 35 Cal. 188; *Dixon v. Ahern*, 19 Nev. 422, 14 Pac. 598.

⁵⁰ *Vernam v. Smith*, 15 N. Y. 329.

⁵¹ *Smiley v. McLauthlin*, 138 Mass. 363. See *Preston v. Hawley*, 101 N. Y. 586, 5 N. E. 770.

⁵² *Beecher v. Duffield*, 97 Mich. 423, 56 N. W. 777.

⁵³ *Jacksonville etc. R. R. Co. v. Louisville etc. R. R. Co.*, 150 Ill. 480, 37 N. E. 924.

⁵⁴ *Hurley v. Lamoreaux*, 29 Minn.

tenancy from year to year, where action is brought to recover accrued rent before the expiration of the year, and the complaint does not allege an agreement or a custom from which it appears that the rent was due when the suit was commenced, the complaint is insufficient, since, under such a tenancy, in the absence of a special agreement or custom to the contrary, rent is not due until the end of the year.⁵⁵ An objection to a complaint for rent alleged to be due upon an indenture of lease, upon the ground that the complaint does not sufficiently aver demand and non-payment, is waived by failure to demur especially thereto, and cannot be urged upon general demurrer.⁵⁶

§ 6656. Complaint.—The complaint in unlawful detainer must be in writing and verified, and must set forth the facts, describe the property with reasonable certainty, may set forth any circumstances of fraud, force, or violence, and claim damages therefor, and state the amount of rent due, if any.⁵⁷ The summons issued thereon must require defendant to appear and answer within three days after its service upon him.⁵⁸

The failure of a complaint, in an action for rent due under a written lease, to allege the performance or an excuse for the non-performance of the covenants of the lease to be performed on the part of the lessor, if error, is error without injury, where the covenants are set up in a counterclaim and their breach therein alleged, and the case is tried upon the issues thus raised.⁵⁹ A complaint which alleges that D. (third person) rented a store to the defendant at his request, for which the defendant promised to pay the plaintiff the reasonable value, and further alleging the reasonable value and non-payment, states a cause of action.⁶⁰

138, 12 N. W. 447. See Aull Sav. Bank v. Aull, 80 Mo. 199; Henderson v. Detroit, 61 Mich. 378, 28 Pac. 133.

⁵⁵ Indianapolis etc. R. R. Co. v. First Nat. Bank, 134 Ind. 127, 33 N. E. 679.

⁵⁶ Bliss v. Sneath, 103 Cal. 43, 36 Pac. 1029.

⁵⁷ Cal. Code Civ. Proc., § 1166.

⁵⁸ Cal. Code Civ. Proc., § 1167; Ariz. Civ. Code, par. 2673; Idaho Rev. Codes, § 5100; Mont. Rev. Codes,

§ 7277; Nev. Comp. Laws, §§ 3842, 3855; N. Mex. Comp. Laws, § 2685, subds. 17, 18; Or. B. & C. Codes, § 5749; Utah Rev. Stats., § 3580; Wash. Bal. Codes, §§ 5532, 5533; Wyo. Rev. Stats., § 4488.

⁵⁹ Gillaspie v. Hagans, 90 Cal. 90, 27 Pac. 34. For instance of sufficient allegation of an implied contract, see Bank of Sun City v. Neff, 50 Kan. 506, 31 Pac. 1054.

⁶⁰ Schneider v. White, 12 Or. 503, 8 Pac. 652.

§ 6657. **Parties.**—The vendee is entitled to possession even before the execution of the deed.⁶¹ The grantee of the demised premises, on the reversion thereof, is the proper party to bring suit for the recovery of rent which accrued and became due before, and, *a fortiori*, after, the conveyance to him. After such conveyance an action by the grantor for rent cannot be sustained.⁶² Tenants in common may join in an action for use and occupation without showing a joint demise.⁶³ So, in England, an infant can also maintain this action, although he has a general guardian.⁶⁴

No person other than the tenant and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties defendant in unlawful detainer proceedings; but if any parties served with process, or appearing, are guilty of the offense charged, judgment must be rendered against them. Persons becoming subtenants after service of the first notice in the proceedings are bound by all proceedings had therein the same as if they had been served and made parties;⁶⁵ otherwise, the general rule relating to parties applies.⁶⁶

§ 6658. **Separate demands.**—In New York, in an action for use and occupation, demands for rent which accrued in the lifetime of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly joined as one cause of action, against the executors as such.⁶⁷

§ 6659. **Tenant at will.**—If a party enter upon land which he has contracted to purchase, with the consent of the vendor, and the contract falls through because the purchaser fails to pay as agreed, the vendor may treat him as a tenant at will, and may bring *assumpsit* for use and occupation, or it seems he may maintain trespass.⁶⁸ After the determination of a tenancy at will by notice, *assumpsit* for use and occupation lies against the tenant, if he holds over.⁶⁹ A recovery can be had in an action for use

⁶¹ *Brown v. Grady*, 16 Wyo. 151, 92 Pac. 622.

⁶² *Anderson v. Treadwell*, 1 Edm. 201.

⁶³ *Porter v. Bleiler*, 17 Barb. 149.

⁶⁴ *Id.* See *Fitzmaurice v. Waugh*, 3 Dowl. & R. 273; 16 Eng. Com. L. Rep. 199.

⁶⁵ Cal. Code Civ. Proc., § 1164.

⁶⁶ Cal. Code Civ. Proc., § 1165.

⁶⁷ *Pugsley v. Aikin*, 11 N. Y. 494.

⁶⁸ *Woodbury v. Woodbury*, 47 N. H. 11, 90 Am. Dec. 555; *Jones v. Nathrop*, 1 West Coast Rep. 279.

⁶⁹ *Hogsett v. Ellis*, 17 Mich. 351, 3 Am. Law Rev. 757, 758.

and occupation where the defendant holds over after the expiration of his term.⁷⁰

§ 6660. **Interest.**—Interest may be recovered on a claim for use and occupation, after demand.⁷¹ Where the defendant holds under color of title adversely to the plaintiff, the true measure of damages is held to be the fair rental value of the premises, together with interest thereon to the time of the trial.⁷²

§ 6661. **Improvements.**—A defendant who entered under a bond for a deed from the plaintiff, cannot set off his improvements against the damages for use and occupation.⁷³

§ 6662. **Essential allegations.**—Facts on which the amount of compensation depends must be set forth.⁷⁴ The word “hired” implies a request.⁷⁵

§ 6663. **Parties—Cotenants.**—The common-law rule that one cotenant cannot recover from another for use of premises unless his occupation amounts to an ouster, or is under express agreement amounting to a bailment, is not in force in Montana,⁷⁶ because the code expressly allows the cotenant his share of the net profits, whether from rents received or from profitable use by one of the cotenants.⁷⁷

§ 6664. **Defense—Admission.**—The plea of no rents in arrears admits the demise as laid in the avowry.⁷⁸ An omission to join issue upon an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, cured by the verdict.⁷⁹

§ 6665. **Denial of the lease** will not admit evidence that before the commencement of the action he had parted with all interest

⁷⁰ County Commissioners v. Brown, 2 Colo. App. 473, 31 Pac. 525.

⁷¹ Ten Eyck v. Houghtaling, 12 How. Pr. 523.

⁷² Meeker v. Gardella, 1 Wash. 139, 23 Pac. 837.

⁷³ Kilburn v. Ritchie, 2 Cal. 146, 56 Am. Dec. 326.

⁷⁴ Relyea v. Drew, 1 Denio, 561.

⁷⁵ Emery v. Fell, 2 T. R. 28.

⁷⁶ Ayotte v. Nadeau, 32 Mont. 493, 81 Pac. 145.

⁷⁷ Mont. Rev. Codes, § 6499.

⁷⁸ Alexander v. Harris, 4 Cranch, 299, 2 L. Ed. 627; affirming 1 Cranch C. C. 243, Fed. Cas. No. 168.

⁷⁹ Dermott v. Wallach, 1 Black, 96, 17 L. Ed. 50.

in the lease and assignment.⁸⁰ The occupation under a parol transfer might be sufficient to bind the defendant.⁸¹

§ 6666. **Defense—Assignment.**—One of the Van Rensselaer leases was executed in 1799. It did not appear that rent was ever paid under it, and it was proved that rent had not been paid for twenty-two years. It was held that as the so-called lease was in fee, it was an assignment, and did not create the relation of landlord and tenant, and that the claim against the grantee on his covenant was barred.⁸²

§ 6667. **Forfeiture.**—To work a forfeiture of a lease for non-payment of rent a demand must be made for the precise sum due on the premises, or wherever the rent is payable.⁸³

§ 6668. **Defense—Eviction.**—The eviction, to constitute a bar, must be averred to have taken place before the rent claimed fell due.⁸⁴ It must be stated that the tenant was evicted or expelled from the premises, and kept out of possession until after the rent became due.⁸⁵

§ 6669. **Insufficient defense.**—In an action for rent the complaint alleged that the letting was by an agreement in writing (not stated to be under seal), by which the plaintiff leased the premises, and the defendant agreed to pay the rent; but it did not allege that the defendant took possession. The answer set up two defenses: 1. That although the plaintiff, at the time of making the lease, represented that he was the owner of the premises, and entitled to lease them, he was not, but that the premises were owned by third parties, "to whom the defendant was liable for the use and occupation thereof," and that no estate or interest vested in the defendant by the lease; 2. That the lease contained an agreement for quiet enjoyment; that shortly after defendant

⁸⁰ *Keteltas v. Maybee*, 1 Code Rep. (N. S.) 363.

⁸¹ *Carter v. Hammett*, 12 Barb. 253.

⁸² *Lyon v. Chase*, 51 Barb. 13. See *Cruger v. McClaughry*, 51 Barb. 642; *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Hosford v. Ballard*, 39 N. Y. 147. See, also, *McLeran v. Benton*, 43 Cal. 468.

⁸³ *Gage v. Bates*, 40 Cal. 384; *O'Connor v. Kelly*, 41 Cal. 432.

⁸⁴ *McCarty v. Hudsons*, 24 Wend. 291.

⁸⁵ *Vernam v. Smith*, 15 N. Y. 327. As to constructive eviction relieving tenant from payment of rent, see *Skaggs v. Emerson*, 50 Cal. 3; *Fillebrown v. Hoar*, 124 Mass. 580.

entered into possession, one W. brought an action of ejectment against him, and after defense recovered judgment against him for the possession, with costs; that W. made claim on the defendant for mesne profits in a sum equal to the rent claimed by the plaintiff, and defendant demanded judgment against the plaintiff for his damages by failure of the plaintiff's title. It was held, on demurrer to the answer, that since the defendant had voluntarily shown the fact of occupation, which the plaintiff had omitted to state, the rule precluding the tenant from denying his landlord's title in an action for use and occupation must be held to apply, and that the first defense was insufficient. If there was any other party who had an apparent claim for the use of the premises, the defendant should have sought a remedy by interpleader. It was also held that the second defense was insufficient, it showing no eviction.⁸⁶

§ 6670. **Eviction—Must be specially set up.**—New matter in defense, such as an eviction, must be specially pleaded.⁸⁷ In an action for rent the defendant pleaded that the plaintiff during the term leased to another person, and excluded the defendant from a part of the premises, in the use of which by the second lessee large quantities of water, etc., were discharged on the defendant's part, and so damaged their goods that they were forced to quit the premises; and they claimed damages therefor in the action. It was held that the averments in the plea constitute eviction, and were not set off.⁸⁸

§ 6671. **Judgment and execution.**—Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer, may be entered, in the discretion of the court, either for the amount of the damages and rent found due, or for three times the amount so found; but if the default be in non-payment of rent, execution shall not issue for five days after the entry of the judgment, in which time any party interested in the continuance of the lease may pay into court, for the landlord, the amount found due as rent, with interest, damages, and costs, and the

⁸⁶ Vernam v. Smith, 15 N. Y. 327.

⁸⁷ Coles v. Soulsby, 21 Cal. 47;
overruling McLarren v. Spalding, 2
Cal. 510, where it was held that de-

fendant might prove an eviction under
a plea substantially of nil debet.

⁸⁸ Dunwoody v. Raynor, 52 Pa. St.
292.

lease shall not be forfeited; otherwise, judgment shall be enforced, and if for breach of other covenants, immediately upon rendition.⁸⁹

§ 6672. **Relief from forfeiture.**—In case of hardship, the court may, upon petition, within thirty days after forfeiture is declared by judgment, relieve a tenant against forfeiture of lease, and restore him to his former estate. The application may be made by a tenant, subtenant, mortgagee of the lease, or any person interested in the continuance of the lease. The petition must be verified, and a copy thereof, with notice, be served on plaintiff who may appear and contest the same. All back rent must be paid, and, so far as practicable, full performance of the conditions or covenants as stipulated must be performed.⁹⁰

FORMS—USE AND OCCUPATION.

§ 6673. Complaint on express contract.

Form No. 1794.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff rented to the defendant, and the defendant hired from the plaintiff, [the office No. . . . street], and agreed to pay therefor the monthly rent of . . . dollars, payable [monthly], on the first day of each [month].

II. That defendant occupied the said premises from the . . . day of . . . , 19.., to the . . . day of . . . , 19 . .

III. That defendant has not paid said sum of . . . dollars, being the [part of said] rent due on the . . . day of . . . , 19 . .

[DEMAND OF JUDGMENT.]

§ 6674. Complaint for rent reserved in lease.

Form No. 1795.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant entered into a covenant with plaintiff, under their hands and

⁸⁹ Cal. Code Civ. Proc., § 1174, as amended 1907. Idaho Rev. Codes, § 5107; Mont. Rev. Codes, § 7288; Utah Rev. Stats.,

⁹⁰ Cal. Code Civ. Proc., § 1179; § 3584.

seals, a copy of which is annexed hereto, and made a part of this complaint, marked "Exhibit A." [Or state the substance of the agreement.]

II. That the defendant has not paid the rent for the month ending on the . . . day of . . . , 19.., amounting to . . . dollars.

[DEMAND OF JUDGMENT.]

[Annex copy of lease, marked "Exhibit A."']

§ 6675. Complaint for deficiency after re-entry.

Form No. 1796.

[TITLE.]

The plaintiff complains, and alleges:

I. That by a lease made between the plaintiff and the defendant, on the . . . day of . . . , 19.., at . . . , the defendant rented from the plaintiff, and the plaintiff demised and leased to the defendant, the premises therein mentioned, at the monthly rent of . . . dollars, gold coin, payable monthly in advance, on the . . . day of each and every month, and that said indenture contained a covenant of which the following is a copy: [Copy covenant.]

II. That defendant, contrary to his covenant, [state the breach]; and that the plaintiff for that cause re-entered the premises, and took possession thereof by virtue of the authority given in said lease, and as agent of the defendant, and not otherwise, and that he made diligent efforts to relet the premises for the defendant, but was unable to do so.

III. That thereby the plaintiff lost the sum of . . . dollars for rent for the months of . . . and

[DEMAND OF JUDGMENT.]

§ 6676. Complaint in action on promise to pay for surrender of lease.

Form No. 1797.

[TITLE.]

The plaintiff complains, and alleges:

I. That at the time hereinafter mentioned, the plaintiff leased from the defendant a house and lot in the town of . . . , for a term commencing on the . . . day of . . . , 19.., and ending on the . . . day of . . . , 19.., under which he was entitled to the possession of said house and lot.

II. That on the . . . day of . . . , 19.., the defendant promised the plaintiff that in consideration that he, the plaintiff, would surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of . . . dollars.

III. That the plaintiff thereupon surrendered the unexpired term of said lease and the possession of said land to the defendant.

IV. That no part of said sum has been paid.

[DEMAND OF JUDGMENT.]

§ 6677. Complaint against assignee of lessee.

Form No. 1798.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., by a lease made between this plaintiff and one A. B., under the hand and seal of said A. B. [of which a copy is annexed], this plaintiff leased to said A. B., and said A. B. rented from the plaintiff, certain lands, to have and to hold to said A. B. and his assigns, from the . . . day of . . . , 19.., for the term of . . . , then next ensuing, for the [monthly] rent of . . . dollars, payable to this plaintiff on the [state days of payment], which rent said A. B. did thereby, for himself and his assigns, covenant to pay to the plaintiff accordingly.

II. That thereafter, and during said term, to-wit, on the . . . day of . . . , 19.., [naming a day before breach], all the estate and interest of said A. B. in said term, by an assignment then by him made, became vested in the defendant, who thereupon entered into possession of the demised premises.

III. That during the time the defendant was so possessed of the premises, to-wit, on the . . . day of . . . , 19.., the sum of . . . dollars of said rent, for the month ending on that day [or otherwise], became due to the plaintiff from the defendant.

IV. That he has not paid the same or any part thereof.

[DEMAND OF JUDGMENT.]

§ 6678. Complaint by grantee of reversion against lessee.

Form No. 1799.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. was the owner in fee of certain premises [describe them], and on the . . . day of . . . , 19.., by a lease

made between him and the defendant, under the hand and seal of the defendant, a copy of which is annexed and made a part of this complaint, marked "Exhibit A," he leased to the defendant said premises, from the . . . day of . . . , 19.., for the term of . . . then next ensuing, for the [monthly or yearly] rent of . . . dollars, payable to said A. B., his heirs and assigns, on the [state days of payment], which rent the defendant did thereby covenant to pay to said A. B., his heirs and assigns, accordingly.

II. That thereafter, on the . . . day of . . . , 19.., at . . . , said A. B., by his deed, under his hand and seal, sold and conveyed to this plaintiff the demised premises.

III. That notice thereof was given to this defendant.

IV. That thereafter, to-wit, on the . . . day of . . . , 19.., the sum of . . . dollars of said rent, for the quarter ending on that day [or otherwise], became due to the plaintiff from the defendant.

V. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

[Annex "Exhibit A."]

§ 6679. Allegation of assignment.

Form No. 1800.

That on the . . . day of . . . , 19.., at . . . , the said A. B. assigned to the plaintiff said lease and covenants, and all his right to the rent therein secured.

§ 6680. Allegation by heir of reversioner.

Form No. 1801.

That the said A. B. was on the . . . day of . . . , 19.., seised of the reversion in said demised premises; that afterwards, and during the said term, on the . . . day of . . . , 19.., A. B. died so seised; whereupon the said reversion then descended to the plaintiff as his son and heir, and thereby plaintiff then became seised thereof in fee.

§ 6681. Complaint by assignee of devisee against assignee of lessee.

Form No. 1802.

[TITLE.]

The plaintiff complains, and alleges:

I. That one A. B. was in his lifetime the owner in fee of certain premises [describe them]; and that on the . . . day of . . . , 19.., he leased the same to one C. D., by his lease dated on that day, a copy of which is hereto annexed as part of this complaint, and marked "Exhibit A."

II. That by virtue thereof the said C. D. entered into the possession of the demised premises.

III. That on the . . . day of . . . , 19.., at . . . , the said C. D. assigned all his right, title, and interest in the demised premises to the defendant.

IV. That on the . . . day of . . . , 19.., at . . . , the said A. B. died.

V. That by his last will and testament, which was proved and admitted to probate before the probate court of the county of . . . , in this state, on the . . . day of . . . , 19.., the said A. B. devised the reversion and rent to one E. F.

VI. That on the . . . day of . . . , 19.., at . . . , the said E. F. assigned the said reversion and rent to the plaintiff.

VII. That after the said E. F. so assigned the said reversion and rent to the plaintiff, the sum of . . . dollars accrued as the rent of said premises for the [month or quarter] ending on the . . . day of . . . , 19.., under and according to the terms of said lease.

VIII. That the defendant has not paid the same.

[DEMAND OF JUDGMENT.]

[Annex copy of lease, marked "Exhibit A."]

§ 6682. Complaint against lessee for use and occupation of pasture.

Form No. 1803.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant hired from the plaintiff, and the plaintiff rented to the defendant, the vacant lot of land [describe it], at the rent of . . . dollars per month, payable in gold coin, monthly [or otherwise], on the first day of each month.

II. That defendant occupied said lot by permission of the plaintiff, and as his tenant, under said agreement, for the grazing of his sheep [or cattle], from the . . . day of . . . , 19.., to the . . . day of . . . , 19...

III. That the defendant has not paid the rent for the months of . . . and

[DEMAND OF JUDGMENT.]

§ 6683. Complaint for use and occupation—Implied contract.

Form No. 1804.

[TITLE.]

The plaintiff complains, and alleges:

I. That defendant occupied the [stable or dwelling-house, No. 47 . . . street], by permission of the plaintiff, from the . . . day of . . . , 19.., until the . . . day of . . . , 19...

II. That the use of the said premises for the said period was reasonably worth . . . dollars.

III. That defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 6684. Complaint for lodging and board.

Form No. 1805.

[TITLE.]

The plaintiff complains, and alleges:

I. That from the . . . day of . . . , 19.., until the . . . day of . . . , 19.., defendant occupied certain rooms in the house [No. 54 . . . street, city of . . .] by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance, and other necessities.

II. That in consideration thereof, the defendant promised to pay [or the same was reasonably worth] the sum of . . . dollars.

III. That the defendant has not paid the same, nor any part thereof.

[DEMAND OF JUDGMENT.]

§ 6685. Allegation for lodging.

Form No. 1806.

That the defendant occupied rooms in, and part of the house of the plaintiff, at . . . [and if furnished, add: together with furniture, linen, and other household necessities of the plaintiff

which were therein], by the plaintiff's permission, as his tenant, from [etc.].

§ 6686. Complaint for hire of personal property.

Form No. 1807.

[TITLE.]

The plaintiff complains, and alleges:

I. That between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., the defendant hired from the plaintiff [horses, carriages, etc.], for which he promised to pay the plaintiff, on account thereof, the sum of . . . dollars on the . . . day of . . . , 19...

II. That the defendant has not paid the same [or, that no part of the same has been paid, except the sum of, etc.]

[DEMAND OF JUDGMENT.]

§ 6687. Complaint for hire of piano, with damages for not returning it.

Form No. 1808.

[TITLE.]

The plaintiff complains, and alleges:

First: For a first cause of action:

I. That on the . . . day of . . . , 19.., at . . . , the defendant hired from the plaintiff one piano, the property of the plaintiff, for the space of [six] months, then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted, for the use of which he promised to pay this plaintiff a reasonable sum [or state how much].

II. That . . . dollars was a reasonable sum for the hire of the same.

III. That he has not paid the same.

Second: And for a second cause of action:

I. [Repeat I of the first cause or refer to it and adopt it as a part of this cause of action.]

II. That the value of the piano so hired by the defendant, as above alleged, was . . . dollars, and that the defendant, in violation of his agreement, has not returned the same, although he was on the . . . day of . . . , 19.., at . . . , requested by the plaintiff so to do; to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6688. Complaint for hire of furniture, etc., with damages for ill-use.

Form No. 1809.

[TITLE.]

The plaintiff complains, and alleges:

First: For a first cause of action:

I. That on the . . . day of . . . , 19.., at . . . , the plaintiff rented to the defendant, and the defendant hired from the plaintiff, household furniture, plate, pictures, and books, the property of the plaintiff, to-wit, [describe the articles], for the space of . . . then next ensuing, to be returned by him to the plaintiff at the expiration of said time, in good condition, reasonable wear and tear thereof excepted.

II. That he promised to pay the plaintiff for the use thereof . . . dollars [in equal quarterly payments, on the . . . days of . . . thereafter].

III. That no part thereof has been paid.

Second: For a second cause of action:

I. [Allege as in preceding form to II.]

II. The plaintiff further alleges that the value of the property so hired by the defendant, as above alleged, was . . . dollars.

III. That the defendant, in violation of his said agreement to return the same in good condition, neglected the same, and through his negligence, carelessness, and ill-use the same became broken, defaced, and injured beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

ANSWERS.

§ 6689. Denial of use and occupation.

Form No. 1810.

[TITLE.]

The defendant answers to the complaint:

That he did not occupy the premises as alleged, or at all.

§ 6690. The same—Denial of hiring.

Form No. 1811.

[TITLE.]

The defendant answers to the complaint:

That he did not hire said premises of the plaintiff as alleged, or in any manner, or at all.

§ 6691. The same—Denial by assignee.

Form No. 1812.

[TITLE.]

The defendant answers to the complaint:

That said [lessee] did not hire the premises from the defendant as alleged; and that no assignment of any such lease was made to or accepted by the defendant, as alleged; and that the defendant did not occupy the premises under the alleged lease, or under any lease.

§ 6692. The same—Assignee's assignment to third person.

Form No. 1813.

[TITLE.]

The defendant answers to the complaint:

That before the rent claimed in the complaint became due, and on or about the . . . day of . . . , 19.., the defendant assigned all his interest in said lease to one C. D., who then entered into possession, and so continued when said rent became due.

§ 6693. The same—Eviction.

Form No. 1814.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., the plaintiff evicted him from the premises mentioned in the complaint, and has ever since kept him out of the possession thereof [or state the facts].

§ 6694. The same—Surrender.

Form No. 1815.

[TITLE.]

The defendant answers to the complaint:

That on the . . . day of . . . , 19.., he surrendered to the plaintiff the premises mentioned in the complaint, and the plaintiff accepted the same.

§ 6695. The same—Defense to one installment.

Form No. 1816.

[TITLE.]

The defendant answers to the complaint:

That as to the last installment mentioned in the complaint the defendant alleges that after the alleged lease was made [or after the alleged letting], and before said installment became due, the plaintiff evicted him from the premises, and has ever since kept him out of the possession thereof.

CHAPTER CLI.

TAXES AND TAXATION.

§ 6696. **Mode of collecting taxes in California.**—The provisions of section 3716 of the California Political Code are as follows: "Every tax has the effect of a judgment against the person, and every lien created by this title¹ has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof." A tax duly levied, and lien created thereby, cannot be said to have the force or effect of an execution levied under judgment against all property of defendant. The right of redemption from tax-sale is subject to change at the will of the legislature at any time.^{1a} A tax due on personal property is a lien upon the real property of the owner, from and after twelve o'clock M. of the first Monday in March in each year,^{1b} and every tax due upon real property is a lien against the property assessed, and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements, and these liens attach as of the first Monday in March in each year.² Section 3764 et seq., provides for the publication of the delinquent list and notice of sale, the manner of sale, time, place, etc. With these provisions in force, it can rarely become necessary or advisable to sue for the collection of a tax. There are certain cases, however, in which suits are expressly authorized by the Political Code, as for the collection of taxes assessed on personal property from persons who have removed to another county.³ The controller may direct the collector not to proceed with the sale of any property on the delinquent tax-list, whereon the taxes amount to three hundred dollars or more, and suit therefor is then filed in the proper county by the attorney-general upon direction of the controller, in the name of the people of the state of California, to collect such tax and costs.⁴

¹ Cal. Pol. Code, part. 3, tit. 9.

^{1a} *Teralta v. Shaffer*, 116 Cal. 518,
58 Am. St. Rep. 194, 48 Pac. 613.

^{1b} Cal. Pol. Code, § 3717.

² Cal. Pol. Code, § 3718.

³ Cal. Pol. Code, § 3808.

⁴ Cal. Pol. Code, § 3899; *People v. Ballerino*, 99 Cal. 599, 34 Pac. 330.

In California, the cases are rare where it is necessary to resort to an action for the collection of taxes, except in cases of removal from the county before the collection of taxes assessed upon personal property. In some states, however, taxes can only be enforced against real estate by action and sale under a judgment; but questions relating to the validity and regularity of the assessment of taxes, and of the proceedings for the enforcement or collection of the same, arise in many ways, and most of the text in this chapter will, therefore, be found pertinent.

§ 6697. **Evidence.**—On the trial a certified copy of the assessment, signed by the auditor of the county where the same was made, with the affidavit of the collector thereto attached, that the tax has not been paid, describing it as on the assessment-book or delinquent-list, is primary evidence that such tax and the per centum is due, and entitles him to judgment, unless the defendant proves that the tax was paid.⁵

§ 6698. **Expenses, how paid.**—Under a former California statute the expense of collecting such tax was allowed and a deduction thereof permitted from the amount collected if it did not exceed one third of the amount so collected.⁶

§ 6699. **Action will not lie.**—An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the wording of the act creating the tax. If the act merely imposes a tax upon property, and provides a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the statute is silent as to the mode of enforcement, then an action would lie for the enforcement of the obligation; for the rule is general that debt lies at common law to enforce a statutory duty or penalty of forfeiture.⁷ The provisions of the constitution and revenue laws on the subject of taxation are to be understood as referring to private property and persons only, and not to

⁵ Cal. Pol. Code, § 3809.

⁶ Cal. Pol. Code, § 3810; repealed by act of March 28, 1895. Payments heretofore made as compensation or commissions for the collection of

delinquent taxes were approved and legalized by act of March 26, 1895.

⁷ State of California v. Poulterer, 16 Cal. 514.

public property, as to state, counties, towns, or municipal corporations.⁸ The state cannot tax and sue itself;⁹ nor can it in person, or as represented in its local subordinate government, be sued without its own consent.¹⁰

§ 6700. **Assessment.**—If property is not properly assessed, the assessment and tax levied thereon imposes no legal obligation to pay the taxes so levied on the defendants or any other person, and creates no lien on the real estate so assessed.¹¹ However, there is a legal as well as a moral obligation to pay, and also a lien established by law, for the general annual tax, irrespective of the regularity of assessment.¹² The words “assessment” and “taxation,” as used in the California constitution, do not have the same signification.¹³ When several parcels of land are assessed to the same person, they must be separately valued, and the value of each parcel must be placed under the head “value of land.”¹⁴ Where property owned by S. B. Whipple, who had always been known by that name and no other, was assessed to S. M. Whipple, it was held that the assessment was void, because there was no designation of the proper owner.¹⁵ So an assessment to the owner by his surname, leaving a blank for his given name, is void, and a deed executed to a purchaser of the land, at a sale for the tax, is void also. Under section 3628 of the Political Code of California, a mistake in the name of the owner of real property does not invalidate such assessment; but a different rule prevails in regard to assessments of personal property. An assessment of the latter class of property in which there is a mistake in the name of the owner is void.¹⁶

§ 6701. **Assessment of valuation for revenue purposes.**—Where, in making an assessment on real estate for revenue purposes, a dispute arose between the assessor and owner as to value, and the assessor, taking away the sworn statement of

⁸ *People v. Doe*, 36 Cal. 220; citing *Mayo v. Ah Loy*, 32 Cal. 477, 91 Am. Dec. 595; Cal. Pol. Code, § 3607. As to tax on collateral inheritances, see act of March 9, 1895.

⁹ *People v. McCreery*, 34 Cal. 433.

¹⁰ *Sharp v. Contra Costa Co.*, 34 Cal. 284; *People v. Doe*, 36 Cal. 220.

¹¹ *People v. Pearis*, 37 Cal. 259.

¹² *Couts v. Cornell*, 147 Cal. 560, 109 Am. St. Rep. 168, 82 Pac. 194.

¹³ *Taylor v. Palmer*, 31 Cal. 240.

¹⁴ *People v. Hollister*, 47 Cal. 408.

¹⁵ *People v. Whipple*, 47 Cal. 592.

¹⁶ *Lake Co. v. Sulphur Bank etc. Co.*, 4 West Coast Rep. 186; *Crawford v. Schmidt*, 47 Cal. 617. As to assessments void on account of the descrip-

the owner, with a blank left for the value, said he would submit the dispute to the board of equalization, and afterwards filled the blank in the sworn statement with a higher valuation than was admitted by the owner, and the property was taxed at that valuation, and the owner never appeared before the board of equalization, it was held that the assessment, though not entirely regular, was not fraudulent, and that a judgment for the tax, as assessed, should stand.¹⁷

§ 6702. Assessors' duties.—It is the duty of assessors to assess all property in their respective districts, counties, etc., which comprehends all property, except that which may be denominated generally public property.¹⁸ He must make the valuation of property.¹⁹ And it must be made against the owner when known. The individual, and not the property, pays the tax.²⁰ But if the assessor cannot find the person to be taxed, he may nevertheless assess the property.²¹ That the assessment must be made on or before the first Monday in July is directory.²² The assessment-roll, when completed and certified by the assessor to the board of supervisors, is the only evidence of his acts and intentions.²³ There is no particular form required for the certificate.²⁴ The making of a certified copy by an assessor of an assessment-roll made by another assessor in a previous year is not an assessment of property.²⁵ Under section 101 of the revenue act of Nevada of 1865,²⁶ assessors may call for sworn statements of the amount and value of the proceeds of mines; but they are not bound by such statements in making their assessments.²⁷

§ 6703. Auditors' duties.—The county board of equalization being authorized to equalize taxes, if they make an order reducing

tion of the land, see *People v. Cone*, 48 Cal. 427; *People v. Hyde*, 48 Cal. 431; *People v. Hancock*, 48 Cal. 631.

¹⁷ *State v. Wright*, 4 Nev. 251.

¹⁸ *People v. McCreery*, 34 Cal. 432; Cal. Pol. Code, § 3628. See *Landregan v. Peppin*, 86 Cal. 122, 24 Pac. 859.

¹⁹ *People v. San Francisco Savings Union*, 31 Cal. 132.

²⁰ *Kelsey v. Abbott*, 13 Cal. 609; cited in *Garwood v. Hastings*, 38 Cal. 216; *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735.

²¹ *Hart v. Plain*, 14 Cal. 148; *Landregan v. Peppin*, 86 Cal. 122, 24 Pac. 859.

²² *Id.*; Cal. Pol. Code, § 3652.

²³ *People v. San Francisco Savings Union*, 31 Cal. 132.

²⁴ *State v. Western Union Tel. Co.*, 4 Nev. 338.

²⁵ *People v. Hastings*, 29 Cal. 449.

²⁶ Nev. Stats. 1865, p. 307.

²⁷ *State v. Kruttschnitt*, 4 Nev. 178. See, generally, Cal. Pol. Code, §§ 3627-3663.

the assessments, however illegal it may be, the county auditor must be governed by their action until it is set aside by a court of competent jurisdiction.²⁸

§ 6704. **Board of equalization.**—The presumption of law is that the members of the board of equalization perform their duty and correct any inequality in the assessment of taxes.²⁹ They cannot add to the valuation of property without evidence authorizing them to do so.³⁰ They cannot make a new assessment.³¹

§ 6705. **Burden of proof.**—In a suit for delinquent taxes, it is sufficient on the part of the state to show a regular assessment, without being required to show a delinquency. The only defenses which can be made to resist a judgment are affirmative in their character, and must be specially pleaded and affirmatively made out by the defendant.³² In a suit to recover taxes paid under protest, the burden is on plaintiff to show that the acts relative to the assessment were unauthorized.³³ The valuation of the preceding year is immaterial in an action to recover excessive taxes paid under protest; but a deed reciting a consideration of a specified sum, executed fourteen days after the date upon which valuations are estimated for assessment, is material.³⁴

§ 6706. **Capital of bank.**—The capital of a bank embraces all its property, real and personal. Where the capital stock of a bank is exempted from taxation by the charter, its banking-house is equally exempt with every other part of its capital.³⁵

§ 6707. **Capitation tax.**—The revenue law imposing a capitation tax of one dollar on all passengers carried out of the state by stage companies is not a regulation of commerce among the states, nor a tax on exports, and is not in conflict with the powers of the federal government.³⁶

§ 6708. **Chose in action.**—The chose in action follows the person of those having the right. When the holder of such right

²⁸ State v. Fish, 4 Nev. 216.

²⁹ Guy v. Washburn, 23 Cal. 111.

³⁰ People v. Reynolds, 28 Cal. 107.

³¹ Id. See Cal. Pol. Code, § 3672, et seq.

³² State v. Western Union Tel. Co., 4 Nev. 338.

³³ Savings etc. Soc. v. San Francisco, 146 Cal. 673, 80 Pac. 1036.

³⁴ Carlisle v. Chehalis County, 32 Wash. 284, 73 Pac. 349.

³⁵ New Haven v. City Bank, 31 Conn. 106.

³⁶ Ex parte Crandall, 1 Nev. 294.

resides out of the state of Nevada the state has no jurisdiction over the person nor over the thing proposed to be taxed, and cannot tax either. The state can only tax choses in action belonging to its own citizens or residents.³⁷

§ 6709. **Claim.**—The term “claim,” as used in section 5 of the California revenue act of 1861, means not only an assertion of title to, but an actual possession of, the land claimed.³⁸

§ 6710. **“Claim to and possession of.”**—The claim to and possession of land is property liable to taxation, even if the land belong to the United States, but such is not a tax upon the land itself.³⁹

§ 6711. **Collection of tax.**—A tax-collector elected for a city cannot collect the taxes of an adjoining town, even if it has, after his election, and after the levy of the tax, been annexed to the city.⁴⁰

§ 6712. **Complaint.**—The complaint should not only aver that the tax was levied upon and assessed against personal property, but also the kind or kinds of personal property.⁴¹ The complaint must aver the failure of the tax-collector to collect the delinquent tax, by reason of his inability to find, seize, or sell the property belonging to the delinquent.⁴² A complaint in a tax-suit which shows only that the property taxed was assessed as the estate of R., deceased, and that the defendants, at the time of the assessment, owned and possessed it, does not state facts sufficient to constitute a cause of action, because not showing that it was assessed to any particular party whose duty it was to pay the taxes, or that it was made to unknown owners.⁴³ A taxpayer on the proceeds of mines may complain of inequality of assessment upon him, at any time before the taxes are collected or sued for.⁴⁴ The sufficiency of the complaint in an action to recover delinquent taxes must be tested by the rules regulating pleadings in civil

37 State of Nevada v. Earl, 1 Nev. 354.

38 People v. Frisbie, 31 Cal. 146.

39 People v. Cohen, 31 Cal. 210;

People v. Frisbie, 31 Cal. 146.

40 Mason v. Johnson, 51 Cal. 612.

41 People v. Holladay, 25 Cal. 300.

42 People v. Pico, 20 Cal. 595.

43 People v. De Carrillo, 35 Cal. 37.

44 State v. Manhattan Co., 4 Nev.

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actions.⁴⁵ The complaint must show upon its face a *prima facie* case of a valid tax assessed and levied, and that it is delinquent. It is not enough to aver indebtedness for taxes, but the complaint must show that the taxes were levied upon the property, and when, where, and by whom the levy was made; that the taxes were based upon the assessment averred, and are delinquent and unpaid; and must show how and when the defendant became indebted for taxes, and how and when the five per cent demanded was added to the amount due.⁴⁶ If the suit is against a corporation, there must be an averment in the complaint of the fact of incorporation, and where, and under what law, so that the court may determine where jurisdiction of its person lies.⁴⁷ If the complaint enumerates the property in words identical with those in the assessment-book, it is sufficient.⁴⁸ The statute relating to the collection of delinquent state taxes having prescribed the conditions upon which alone the state may proceed by action, the performance of such conditions is essential to the right to maintain the action, and their performance must be alleged.⁴⁹ A complaint for the foreclosure of tax-liens which contains no allegation of ownership in the defendant of the property assessed, but merely a statement that the list appended is a list of registered unpaid taxes assessed to defendant, is held sufficient as against a demurrer, when nothing appears on the face of the complaint to show that any other person is interested in the property as owner or otherwise.⁵⁰

§ 6713. **Construction of revenue law.**—The requirement of section 101 of the Nevada revenue act of 1865, “that the value of the proceeds of mines shall be ascertained as provided in this act,” has reference to the mode of allowance for the cost of working.⁵¹ The revenue laws are unconstitutional so far as they exempt private property from taxation, and all parts thereof relating to such exemption must be disregarded.⁵²

⁴⁵ *People v. Central Pacific R. R. Co.*, 83 Cal. 383, 23 Pac. 303; Cal. Pol. Code, § 3899.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264.

⁴⁹ *People v. Ballerino*, 99 Cal. 599, 34 Pac. 330.

⁵⁰ *Whatecom County v. Fairhaven Land Co.*, 7 Wash. 101, 34 Pac. 563.

⁵¹ *State v. Kruttschnitt*, 4 Nev. 178.

⁵² *People v. Gerke*, 35 Cal. 677.

§ 6714. **County taxes, by whom levied.**—The amount of taxes for county purposes must be fixed and levied by the board of county commissioners, and without their proper action no county tax can be collected.⁵³

§ 6715. **Debt.**—Standing alone, the word “debt” is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. Debts are declared to be personal property for the purpose of taxation, whether it be debts overdue or underdue.⁵⁴ Money on general deposit at a bank is in legal effect a debt, taxable in the creditor’s residence, and not in the county where such money is deposited.⁵⁵

§ 6716. **Deed.**—If the statute directs the officer who sells land under a judgment for delinquent taxes to sell the smallest quantity that any purchaser will take, and pay the judgment for the tax and costs, a deed of the officer who made the sale, which recites that he has sold the premises to the grantee, who was the highest bidder therefor, is void and conveys no title.⁵⁶ A deed of land under a tax-sale is only *prima facie* evidence that no redemption had been effected, and the party who makes the redemption may, in ejectment on the title acquired by the deed, prove that a redemption was effected.⁵⁷ In the absence of recitals which are declared by statute to be *prima facie* evidence of title, the burden is cast upon the party relying on the deed to prove that the sale was in fact made where the law permits it to be made.⁵⁸ The tax-deed to the state is conclusive evidence (except as against fraud) of the regularity of proceedings from and including the assessment, and conveys absolute title to the state.⁵⁹

§ 6717. **Default.**—A taxpayer is not in default until he has an opportunity to pay the taxes assessed against him, so that there is no person authorized to receive the taxes until the delinquent list goes into the hands of the district attorney; the taxpayer, on receiving notice of the fact, ought to be allowed to pay the tax

⁵³ State v. Manhattan Co., 4 Nev. 318.

⁵⁴ People v. Arguello, 37 Cal. 524. As to taxation of solvent debts, see State v. Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703; Bank of Mendocino v. Chalfant, 51 Cal. 369.

⁵⁵ City and County of San Fran-

cisco v. Lux, 64 Cal. 481, 2 Pac. 254.

⁵⁶ Carpenter v. Gann, 51 Cal. 193.

⁵⁷ Cooper v. Shepardson, 51 Cal. 298.

⁵⁸ Pierce v. Low, 51 Cal. 580. See, also, Mayo v. Haynie, 50 Cal. 71.

⁵⁹ Cal. Pol. Code, § 3787.

without any penalty being imposed.⁶⁰ The attorney-general has the entire control of all tax-suits in the supreme court, on the part of the state of Nevada.⁶¹

§ 6718. **Demand for sworn statement not indispensable.**—An assessment for taxes by the assessor is not vitiated by the fact that he omitted to demand a sworn statement.⁶²

§ 6719. **A description in the assessment of the land as the unsold portion of eleven square leagues of land known as Los Mokelamos is fatally defective.**⁶³ The assessment of lands outside of a city or incorporated town need not describe the land by metes and bounds.⁶⁴ Improvements on real estate and personal property need only be assessed in general terms and under a gross valuation; a specific description of such property is unnecessary.⁶⁵ The object of a description of property in an assessment-roll is to clearly identify the property assessed.⁶⁶ Bonds on deposit are sufficiently described by being designated "money and bonds deposited, as per statute."⁶⁷ An assessment of land is not void by reason of a mistake in description, unless it contains such a falsity in the designation or description as might probably mislead the owner.⁶⁸ Under the act of 1856, a lumping assessment of personal property is bad. The different classes should be stated.⁶⁹ A description of stock as "mining stock" is sufficiently definite.⁷⁰

§ 6720. **Description of property in complaint.**—The California statute of 1861, requiring real estate, in an action to recover taxes, to be described in the complaint with the same particularity as in actions of ejectment, applies only to actions in which the real estate is made a party defendant.⁷¹ A description of a tract of land by name is sufficient.⁷² If a complaint in an action to recover

⁶⁰ *State v. Western Union Tel. Co.*, 4 Nev. 338.

⁶¹ *State v. California Min. Co.*, 13 Nev. 203.

⁶² *State v. Western Union Tel. Co.*, 4 Nev. 338.

⁶³ *People v. Pico*, 20 Cal. 595.

⁶⁴ *High v. Shoemaker*, 22 Cal. 363.

⁶⁵ *People v. Rains*, 23 Cal. 127.

⁶⁶ *People v. Empire Gold etc. Min. Co.*, 33 Cal. 171.

⁶⁷ *People v. Home Ins. Co.*, 29 Cal. 533.

⁶⁸ *Bosworth v. Danzien*, 25 Cal. 296.

⁶⁹ *Falkner v. Hunt*, 16 Cal. 167.

⁷⁰ *City and County of San Francisco v. Flood*, 64 Cal. 504, 2 Pac. 264.

⁷¹ *People v. Leet*, 23 Cal. 161.

⁷² *Id.* See, also, as to sufficiency of description of the land assessed,

judgment for taxes assessed on land and improvements thereon describes the land assessed by giving its name, and metes and bounds, less certain lots sold out of the same, without giving the location and boundaries of the lots sold, the complaint is fatally defective.⁷³ In a suit for taxes, evidence is admissible to prove a description of the property taxed more particularly than that used in the assessment-roll, if there is no contradiction in the two descriptions, and the complaint gives the description used on the trial.⁷⁴

§ 6721. **Dollar-mark.**—Figures placed opposite the town lots in an assessment-roll, without any statement whether they stand for cents, dollars, or eagles, do not fix any valuation, and the assessment is defective.⁷⁵

§ 6722. **Domicile.**—One may be a resident of one state, and taxed as such, when his domicile is in another.⁷⁶

§ 6723. **Easements.**—A street-railroad company's easement of running cars over tracks in a street may be assessed as real property benefited by the widening of said street, for the expense of such widening.⁷⁷

§ 6724. **Flume.**—A flume constructed by a mining company along the bank of a river leading to the claims of the company in the bed of the river is taxable.⁷⁸

§ 6725. **Foreign corporation.**—The place for assessment of a foreign corporation doing business in another state, for the purpose of taxation, is where the principal business is transacted.⁷⁹

Power v. Larabee, 2 N. Dak. 148, 49 N. W. 724; People v. Cone, 48 Cal. 427.

⁷³ People v. Mariposa Co., 31 Cal. 196.

⁷⁴ State v. Real del Monte Co., 1 Nev. 523.

⁷⁵ Hurlbutt v. Butenop, 27 Cal. 50; Braley v. Seaman, 30 Cal. 610; People v. San Francisco Sav. Union, 31 Cal. 132. As to what is sufficient, see People v. Empire G. & S. Min. Co., 33

Cal. 171; People v. McCreery, 34 Cal. 432; State v. Sadler, 21 Nev. 13, 23 Pac. 799; Ward v. Commissioners, 12 Mont. 23, 29 Pac. 658.

⁷⁶ Board of Supervisors v. Davenport, 40 Ill. 197.

⁷⁷ Appeal of North Beach etc. R. R. Co., 32 Cal. 499; Chicago v. Baer, 41 Ill. 306.

⁷⁸ Hart v. Plum, 14 Cal. 148.

⁷⁹ British etc. Ins. Co. v. Commissioners of Taxes, 31 N. Y. 32.

§ 6726. **Inheritance tax.**—The collateral inheritance tax law, imposing a tax upon certain heirs and exempting others, is not a violation of the fourteenth amendment to the federal constitution, the distinctions made being natural.⁸⁰ The objection that it is not uniform does not lie, as it is not a tax upon property, but upon the privilege of receiving property by will or inheritance.⁸¹ The classification is reasonable, and not unequal among members of the same class, and therefore does not discriminate.⁸² It is a special and not a general tax, and the construction of the statute is therefore strictly against the government.⁸³

§ 6727. **California inheritance tax.**—In California, all property which passes by will or by the intestate laws of the state, or which shall be transferred by deed, grant, sale, or gift made in contemplation of the death of the grantor, vendor, or bargainor, or intended to take effect in possession or enjoyment after such death, is subject to a tax, to be paid to the treasurer of the proper county for the use of the state; and such tax is a lien upon the property passed. Valuation is at the market value of such property. The tax is due and payable at the death of the decedent, and interest at the rate of ten per cent per annum is levied thereon if not paid within eighteen months after accrual. If paid within six months, a discount of five per cent is allowed. The superior court first securing jurisdiction in reference to collection of the tax holds it throughout. It must be in a county where some property is located or where decedent resided. If the tax is not paid the court shall issue citation to the parties liable to appear on a day not more than ten weeks from such citation and show cause why such tax should not be paid. It is governed in practice by the rules of the Code of Civil Procedure upon citations; and the decree may be docketed in any other county upon request of the district attorney, without charge of fee. An allowance is made to county treasurers for prosecuting and collecting delinquent inheritance taxes, and they may hire special counsel therewith.⁸⁴

⁸⁰ *In re Campbell's Estate*, 143 Cal. 623, 77 Pac. 674; *Campbell v. California*, 200 U. S. 87, 50 L. Ed. 382, 26 Sup. Ct. 182.

⁸¹ *In re Tuohy's Estate*, 35 Mont. 431, 90 Pac. 170; *In re Magne's Estate*, 32 Colo. 527, 77 Pac. 853; *Dixon v. Ricketts*, 26 Utah, 215, 72 Pac.

947; *State v. Clark*, 30 Wash. 439, 71 Pac. 20.

⁸² *State v. Clark*, 30 Wash. 439, 71 Pac. 20.

⁸³ *People v. Koenig*, 37 Colo. 283, 85 Pac. 1129.

⁸⁴ Cal. Gen. Laws, act 4035; Stats. 1905, p. 341.

§ 6728. **The same—Exemptions.**—Property passed to charitable, benevolent, educational, public and like purposes, is exempt; likewise, ten thousand dollars transferred to the widow or to a minor child; four thousand dollars to the husband or one of lineal issue or ancestor; two thousand dollars transferred to each brother or sister, or a descendant of a brother or sister, the wife or widow of a son, or the husband of a daughter; one thousand five hundred dollars to each uncle and aunt and their heirs; one thousand dollars to each great-uncle or great-aunt and their heirs; five hundred dollars to all others, including strangers and corporations. The rate of tax imposed upon that part not exempt ranges from one to three per cent, upon the closest relatives, and from five to fifteen per cent, upon strangers.⁸⁵ The surviving wife's share of the community property is subject to the inheritance tax, since she takes as an heir and not as a survivor.⁸⁶ Exemptions are not governed by the value of the estate, but by the amount received by each heir.⁸⁷ Any sum paid out of the estate to an heir in consideration of withdrawing a contest is subject to the tax.⁸⁸

§ 6729. **Growing crops.**—Growing crops are private property, and are subject to taxation, the provision of said statute exempting them notwithstanding.⁸⁹ This rule, however, has been changed by section 1 of article XIII of the California constitution of 1879, which exempts growing crops from taxation. Such exemption, however, does not apply to fruit-trees⁹⁰ over four years and grape-vines over three years in orchard or vineyard form.^{90a}

§ 6730. **House on boundary-line.**—Where a taxpayer's house lies on the boundary-line, and partly in two towns, it seems that he is properly taxable in the town where the most necessary and indispensable part of the house is situated, in the absence of other more controlling facts.⁹¹

⁸⁵ Cal. Gen. Laws, act 4035; Stats. 1905, p. 341.

⁸⁶ In re Moffitt's Estate, 153 Cal. 359, 95 Pac. 653, 20 L. R. A. (N. S.) 207.

⁸⁷ People v. Koenig, 37 Colo. 283, 85 Pac. 1129.

⁸⁸ People v. Rice, 40 Colo. 508, 91 Pac. 33.

⁸⁹ People v. Gerke, 35 Cal. 677.

⁹⁰ Cottle v. Spitzer, 65 Cal. 456, 52 Am. Rep. 305, 4 Pac. 435.

^{90a} Cal. Pol. Code, § 3607.

⁹¹ Judkins v. Reed, 48 Me. 386.

§ 6731. **Impost duties.**—There is no restriction upon the taxing power of a state, except the laying of impost or duties on imports or exports, and if in the exercise of this power foreign commerce or commerce among the states be incidentally affected, the state authority must nevertheless be maintained.⁹²

§ 6732. **Improvements on public lands.**—Improvements on public lands of the United States, whether owned by a pre-emptor or one occupying public lands without license, are liable to assessment and taxation, if made so by the revenue laws of a state.⁹³ A local tax for the purpose of internal improvements may be imposed, and the local authorities may be empowered to impose such tax.⁹⁴ For the purpose of taxation, improvements erected by a lessee upon lands owned by and leased from a municipal corporation are regarded as the property of the lessee.⁹⁵

§ 6733. **Judgment.**—A judgment for a debt, and foreclosing a mortgage given to secure it, is subject to taxation only where the owner of the judgment resides, and then the money due upon it is only taxable.⁹⁶ So of choses in action, and property of an intangible character, such as debts and the like.⁹⁷

§ 6734. **Jurisdiction.**—An action brought under the California revenue act of 1861, to recover judgment for unpaid taxes, was not a case in equity, but an action at law; and where the amount was less than three hundred dollars, the district court had no jurisdiction.⁹⁸ If the prayer of the complaint was for a money judgment, the district court did not have the jurisdiction where the amount claimed was less than three hundred dollars; but if the prayer was for the foreclosure of a lien, order of sale, etc., the district court had jurisdiction regardless of the amount claimed. If the action was brought under the provisions of the California act of May 12, 1862, it was a case in equity, and the district court had jurisdiction, although the amount claimed was less than three hundred dollars.⁹⁹ The superior court has original jurisdiction in

⁹² Ex parte Crandall, 1 Nev. 294.

⁹³ People v. Shearer, 30 Cal. 645; Crocker v. Donovan, 1 Okla. 165, 30 Pac. 374.

⁹⁴ Pattison v. Board of Supervisors, 13 Cal. 175.

⁹⁵ City and County of San Fran-

cisco v. McGinn, 67 Cal. 110, 7 Pac. 187.

⁹⁶ People v. Eastman, 25 Cal. 601.

⁹⁷ People v. Park, 23 Cal. 138.

⁹⁸ People v. Mier, 24 Cal. 61; Bell v. Crippen, 28 Cal. 327.

⁹⁹ People v. Mier, 24 Cal. 61.

matters involving the legality of the tax, the legality of which is put in issue.¹⁰⁰ The complaint must show the jurisdiction of the court.¹⁰¹

§ 6735. **Kind and quantity.**—If an assessment of a tax made during the three years preceding March, 1861, is defective in not stating the kind and quantity of property assessed, whether real or personal, or, if real, in not giving its description, the pleader in an action brought to recover judgment for such tax may, if the same can be ascertained, insert in his complaint the necessary averments as to kind and quantity or description.¹⁰²

§ 6736. **Land segregated.**—Where a claim to a tract of land under a Mexican grant somewhere within a certain larger tract was ascertained, and the land segregated by a survey under a decree of confirmation by the United States supreme court, the land became immediately taxable.¹⁰³ The law permits it, and the taxpayer has a right to pay the tax on subdivisions of his property without paying the taxes on his entire property.¹⁰⁴

§ 6737. **Land sold by the United States.**—When land of the United States has been paid for, and a certificate of purchase has been given to the purchaser, it is liable to taxation, although the patent may not have been issued.¹⁰⁵

§ 6738. **Law of tax suits.**—The strict compliance with all the provisions of the statute, required to be shown in cases where property is sold for taxes without a judgment, is not applicable to cases of suits for delinquent taxes in the district courts, where jurisdiction has once been acquired.¹⁰⁶

§ 6739. **Lien of judgment.**—The lien on land of a tax-assessment continues after the land has been transferred to another county, and the tax-collector of the original county can enforce the collection of the tax by a sale.¹⁰⁷

100 *City of Santa Barbara v. El-dred*, 95 Cal. 378, 30 Pac. 562.

101 *People v. Central Pacific R. R. Co.*, 83 Cal. 393, 23 Pac. 303.

102 *People v. Holladay*, 25 Cal. 300.

103 *Palmer v. Boling*, 8 Cal. 387.

104 *State v. Central Pacific R. R. Co.*, 21 Nev. 94, 25 Pac. 442.

105 *People v. Shearer*, 30 Cal. 645.

106 *State v. Western Union Tel. Co.*, 4 Nev. 338.

107 *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

§ 6740. **Legislative restrictions.**—The only restriction imposed upon legislative discretion in the matter of taxation by the California constitution is that it shall be equal and uniform, and in proportion to the property taxed. It affects only the mode of taxation, and where the legislative act conforms to this rule, it is binding and obligatory.¹⁰⁸ Where a special act is passed by the legislature, empowering the board of supervisors of a particular county or counties to levy a tax for special purposes, it does not necessarily repeal the general act or previous special acts. The repeal of acts is by direct terms, or by implication. Repeals by implication are never favored; on the contrary, if prior and subsequent legislative enactments may well subsist together, courts are bound to uphold the former.

§ 6741. **Mill property.**—Under the statute which provides that mills shall be taxable, the machinery contained in a mill is taxable as part of the mill, and it is equally taxable here, although the owner resides out of the state, and it makes no difference that the machinery is personal property.¹⁰⁹

§ 6742. **Mining interests.**—The possession of interest, or the possession and claim to lands for mining purposes, the title to which land is in the United States, is property, and as such is taxable to the claimant.¹¹⁰ The value of a mining claim—that is, the mine itself—cannot be taxed; but this does not exempt everything near the claim necessary to give it value.¹¹¹

§ 6743. **Money at interest taxable.**—In Nevada, all money at interest, secured by mortgage or otherwise, is subject to taxation, without regard to the situation of the mortgagee, whether he be solvent or otherwise, in debt or out of debt.¹¹² A different rule prevailed in California prior to the adoption of the constitution

¹⁰⁸ *Beals v. Amador County*, 35 Cal. 624; citing *Blanding v. Burr*, 13 Cal. 350; *People v. Alameda County*, 26 Cal. 641; *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435; *Town of Guilford v. Cornell*, 18 Barb. 615; and commenting on *Beals v. Amador County*, 28 Cal. 449.

¹⁰⁹ *Sprague v. Lisbon*, 30 Conn. 18.

¹¹⁰ So held in *People v. Shearer*, 30 Cal. 656; *People v. Frisbie*, 31 Cal.

146; *People v. Cohen*, 31 Cal. 210. That such property is not exempt from taxation, consult *People v. McCreery*, 34 Cal. 433; *People v. Gerke*, 35 Cal. 677; *People v. Black Diamond Coal Min. Co.*, 37 Cal. 54. That the legislature has power to tax the interest of an occupant of a mining claim, see *State v. Moore*, 12 Cal. 56.

¹¹¹ *Hart v. Plum*, 14 Cal. 148.

¹¹² *State v. First Nat. Bank*, 4

of 1879.¹¹³ Under that constitution, such property was taxable. A mortgage, deed of trust, contract, or other obligation by which a debt is secured is treated as an interest in the property mortgaged.^{113a}

§ 6744. **Money in county treasurer's hands.**—Money belonging to litigants, in a county treasurer's hands, placed there by order of court, subject to the order of the court, is liable to taxation, and may be assessed to the treasurer by name, and when assessment is levied it becomes a lien on the money in the treasurer's hands;¹¹⁴ so of money in the hands of a county clerk or receiver.¹¹⁵

§ 6745. **Money on deposit.**—A tax levied on money on deposit is legal, and the levy creates a judgment and lien on the property, having the force and effect of an execution.¹¹⁶

§ 6746. **Mortgage.**—The owner of a first mortgage who paid the taxes upon the property and upon a second mortgage, and bought the property at foreclosure sale, has no statutory or contractual relation with such second mortgagee as to make him repay the taxes paid on such second mortgage.¹¹⁷

§ 6747. **Moral obligation.**—The legislature may, in strict conformity with its constitutional powers and duties, recognize a moral obligation as the sole basis for the imposition of taxes. Where a prior statute, for the ascertainment of a debt due from one county to another, provided for its payment by a tax thereby imposed, without allowing or making provision for the payment of interest thereon, under which enactment the debt was fully paid, it is competent for the legislature, by subsequent enactment, to provide for the payment of interest on such debt, by the imposition of a further tax for that purpose.¹¹⁸

Nev. 348; *State v. Carson City Sav. Bank*, 17 Nev. 146, 30 Pac. 703.

¹¹³ See *People v. Hibernia Sav. etc. Soc.*, 51 Cal. 243, 21 Am. Rep. 704; *Bank of Mendocino v. Chalfant*, 51 Cal. 369; *McCoppin v. McCartney*, 60 Cal. 367; *Doland v. Mooney*, 72 Cal. 34, 13 Pac. 71.

^{113a} Cal. Pol. Code, § 3627.

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¹¹⁴ *People v. Lardner*, 30 Cal. 242. See Pol. Code, § 3647.

¹¹⁵ Cal. Pol. Code, § 3647.

¹¹⁶ *Yuba County v. Adams*, 7 Cal. 35.

¹¹⁷ *Henry v. Garden City Bank etc. Co.*, 145 Cal. 54, 78 Pac. 228.

¹¹⁸ *Beals v. Amador County*, 35 Cal. 624

§ 6748. **National banks.**—The state may impose a tax upon the real estate and shares of national banks within its limits, but Congress has reserved to itself the exclusive power over the taxation of banks and bank property of other descriptions. Congress having pointed out a method by which the real estate of the national banks within any state may be taxed, and also the method of taxing their stock, the states are excluded from all other methods of taxation on bank property. The notes, bills, bonds, etc., of national banks are the commodity in which those banks deal in the ordinary course of their business; state taxes upon them are state taxes upon the business of the bank, and such taxes the state cannot impose.¹¹⁹

§ 6749. **Nevada system of taxation.**—All tangible property within the state of Nevada is subject to one, and only one, annual tax. Each acre of land and each piece of coined money are liable to such tax. A tax on money at interest secured by mortgage on land is neither a tax on the pieces of money loaned, the land on which the security is taken, nor upon the paper upon which the promise to pay is written; but it is a tax upon the chose in action or right to collect the debt. Notes and county warrants are property subject to taxation under the revenue laws of the state.¹²⁰

§ 6750. **Notice.**—In California, when the statute provided that the district attorney, before commencing suit, should publish notice to delinquents, it was not necessary to aver in the complaint that this notice was published; but the failure to publish this notice should be taken advantage of by plea in abatement, or it was waived.¹²¹ The time prescribed by the revenue law¹²² within which the assessor is to complete his assessment-roll is only for the convenience of other officers. If the assessor is dilatory, he may render himself liable on his bond, but his dilatoriness furnishes no matter of which a taxpayer can complain, or on account of which he can defeat the tax.¹²³

¹¹⁹ State v. First Nat. Bank, 4 Nev. 348.

¹²⁰ Id.; Drexler v. Tyrrell, 15 Nev. 114.

¹²¹ People v. Rains (No. 2), 23 Cal. 131.

¹²² Stats. 1866, p. 169. See Cal. Pol. Code, §§ 3652-3656.

¹²³ State v. Western Union Tel. Co., 4 Nev. 338.

§ 6751. **Not debts.**—Taxes are not debts within the meaning of that clause of the act which provides that the notes shall be “a legal tender in payment of all debts, public and private.” Congress by these terms only intended such obligations for the payment of money as are founded upon contract.¹²⁴

§ 6752. **Not founded on contract.**—A tax is not founded on contract, and does not establish the relation of debtor and creditor between the taxpayer and state. It is a charge upon persons or property to raise money for public purposes.¹²⁵ Taxes are charges imposed by or under the authority of the legislature upon persons or property subject to its jurisdiction.¹²⁶ A tax foreclosure is *in rem*, and is not a personal action against the owner of the property.¹²⁷

§ 6753. **Obligation to pay tax.**—A party in possession of a lot to which another has acquired title by a deed for a sale for taxes is under no obligation to pay a tax levied after the tax-deed is given.¹²⁸

§ 6754. **Parties.**—The “state of Nevada” is the proper party plaintiff in a suit for delinquent school-taxes, under section 35 of the act of March 20, 1865, relating to schools.¹²⁹

§ 6755. **Personal property.**—The personal estate of a deceased person which is taxable in the town in which he last dwelt is not taxable in any other town.¹³⁰ Personal estate of a ward, in the possession or under the control of a guardian, is liable under the statutes to taxation in the place where such guardian resides.¹³¹

¹²⁴ *Perry v. Washburn*, 20 Cal. 318. See *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *San Gabriel Co. v. Witmer Co.*, 96 Cal. 638, 29 Pac. 500, 31 Pac. 588, 18 L. R. A. 465.

¹²⁵ *Perry v. Washburn*, 20 Cal. 318; approved in *Mendocino County v. Morris*, 32 Cal. 154. That “taxes are not debts drawing interest,” and that “a tax is a charge upon persons to raise money for public purposes,” approved in *People v. Steamer America*, 34 Cal. 681.

¹²⁶ *People v. McCreery*, 34 Cal. 432. See *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

¹²⁷ *Allen v. Peterson*, 38 Wash. 599, 80 Pac. 849.

¹²⁸ *Maina v. Elliott*, 51 Cal. 8.

¹²⁹ *Stats. 1864-1865; State v. First Nat. Bank (No. 3)*, 4 Nev. 491.

¹³⁰ *Hardy v. Inhabitants of Yarmouth*, 6 Allen (Mass.), 277. See, also, *San Francisco v. Lux*, 64 Cal. 481, 2 Pac. 254.

¹³¹ *Tousey v. Bell*, 23 Ind. 423.

§ 6756. **Placerville—Charter of.**—The act incorporating the city of Placerville granted to the common council the right to levy and collect certain taxes, and constituted the city marshal *ex officio* collector of taxes, and made it his duty to collect all taxes due the city, authorized the sale of the property of delinquents for taxes due the city, and further enacted that the manner of assessing and collecting taxes, and proceedings for the sale of property in cases of delinquency, should be regulated by ordinance. The common council enacted by ordinance a mode of collecting delinquent taxes remaining unpaid after a certain date whereby the entire duty was devolved upon the city attorney, and the services of the city marshal were dispensed with. It was held that the ordinance prescribing such mode was void, because in conflict with said incorporation act.¹³²

§ 6757. **Possessory right.**—Taxation of the possessory right was not a violation of the section of the organic act of Nevada, which prohibited the territorial legislature from taxing the property of the United States.¹³³ The object of that section was to protect the government, and not to prevent the taxation of settlers upon public lands. The possession by the citizen of, and his possessory interest in, the public lands, for mining, agriculture, or other purposes, constitutes a species of property recognized by law, and is subject to taxation by the state.¹³⁴

§ 6758. **Power of legislature.**—The legislature has the power of taxation.¹³⁵ Taxing power is an incident of sovereignty, the exercise of which belongs exclusively to every state, and attaches alike upon everything which comes within its jurisdiction.¹³⁶ It attaches to corporate franchises.¹³⁷ A tax must have its origin in a law enacted for that purpose.¹³⁸ It has power to regulate the mode of taxation.¹³⁹ The legislature has exclusive power of apportionment and taxation. The constitution contains no in-

¹³² City of Placerville v. Wilcox, 35 Cal. 21.

¹³³ Hale & Norcross Gold etc. Min. Co. v. Storey County, 1 Nev. 104.

¹³⁴ People v. Shearer, 30 Cal. 645.

¹³⁵ People v. Pacheco, 27 Cal. 175.

¹³⁶ People v. Coleman, 4 Cal. 47, 60 Am. Dec. 581.

¹³⁷ Bank of California v. City and County of San Francisco, 142 Cal. 276, 100 Am. St. Rep. 130, 75 Pac. 832, 64 L. R. A. 918.

¹³⁸ People v. McCreery, 34 Cal. 432.

¹³⁹ De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352.

hibition to the tax, and prescribes no rule of apportionment.¹⁴⁰ The only limitation upon the taxing power of the legislature is the provision for equality and uniformity found in the constitution.¹⁴¹ The power of taxation was given to the legislature without limit, for all purposes allowed by the constitution.¹⁴² Section 2 of article 7 of the constitution of Idaho recognizes three distinct methods of raising a tax—a property tax, a license-tax, and a *per capita*.¹⁴³ The legislature has the power of taxation, without restriction as to mode or limitation as to time, and may prescribe a mode of correcting an informal assessment,¹⁴⁴ but cannot fix the assessed value of property.¹⁴⁵ The fact that the legislature has once exercised its powers in limiting the extent of taxation in municipal corporations¹⁴⁶ does not prevent it from again exercising its power, by enlarging its authority to tax, and the legislature can impose a general tax upon all the property of the state, or a local tax upon the property of particular political subdivisions, as counties, cities, and towns.¹⁴⁷ Limitations by congress upon the right of a state to tax its citizens are to be strictly construed.¹⁴⁸ The power of taxation is a power which the legislature takes from the law of its creation to impose taxes upon the property of the citizens for the support of the government.¹⁴⁹

§ 6759. Practice.—Where an action to recover a personal judgment for a tax, commenced in a justice's court, is transferred to a superior court, an amended complaint may be filed in the superior court to enforce a lien on real estate for the tax.¹⁵⁰

¹⁴⁰ *Burnett v. Mayor of Sacramento*, 12 Cal. 76, 73 Am. Dec. 518.

¹⁴¹ *Blanding v. Burr*, 13 Cal. 343. The cases of *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581, and *High v. Shoemaker*, 22 Cal. 363, so far as they are in conflict herewith, are overruled in *People v. McCreery*, 34 Cal. 432. See *State v. Eldredge*, 27 Utah, 477, 76 Pac. 337.

¹⁴² As to limit of powers of taxation and appropriation, under the eighth article of the constitution, see *Nougues v. Douglass*, 7 Cal. 65.

¹⁴³ *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

¹⁴⁴ *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

¹⁴⁵ *People v. Hastings*, 29 Cal. 442.

¹⁴⁶ Under Cal. Const. 1849, art. 4, § 37.

¹⁴⁷ *Blanding v. Burr*, 13 Cal. 343.

¹⁴⁸ *People v. Shearer*, 30 Cal. 645.

¹⁴⁹ *Taylor v. Palmer*, 31 Cal. 240.

See further, as to the power of taxation, *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067, 92 Cal. 296, 27 Am. St. Rep. 106, 28 Pac. 272, 675, 14 L. R. A. 755; *Security Sav. Bank v. Hinton*, 97 Cal. 214, 32 Pac. 3. That the state may tax the right to receive property by will or inheritance, see *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579, 30 L. R. A. 218; In re *Davis's Estate*, 149 N. Y. 539, 44 N. E. 185.

¹⁵⁰ *People v. Nelson*, 36 Cal. 375.

§ 6760. **Property in lands, how construed.**—The term “property in lands” is not confined to title in fee, but includes any usufructuary interest, whether it be leasehold or a mere right of possession.¹⁵¹

§ 6761. **Property of guardian.**—The property of a guardian cannot be seized to pay taxes assessed against him upon the property of his ward.¹⁵²

§ 6762. **Proceeds of mines.**—The Nevada constitutional provision¹⁵³ which prescribes the taxation of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, “means that the entire annual proceeds of mines are subject to taxation, and not the mere proceeds on hand” when the assessor happens to visit the mines.¹⁵⁴ Under the revenue law, as amended in 1867,¹⁵⁵ assessors must make their estimates of the value of the proceeds of mines on the basis of legal tender (paper currency), and all *ad valorem* taxes, whether on the proceeds of mines or other property, must be equal.¹⁵⁶ The quarterly payments of taxes on the proceeds of mines provided for by the revenue laws are so arranged that the annual proceeds of mines do not pay a larger *pro rata*, even as to interest account, than if one annual tax for the annual proceeds were imposed, payable at the time other annual taxes are payable.¹⁵⁷ The provisions of the revenue law of 1865,¹⁵⁸ for quarterly assessments on the proceeds of mines and quarterly payment of taxes, do not impose more than a regular *pro rata* of taxation on the proceeds of mines, nor require the same property to be paid for more than once.¹⁵⁹ An assessment of the product of a mine, made under the revenue act, as amended in 1867,¹⁶⁰ must give both the amount and value of such product; and if an assessor received a sworn statement, giving the products of a mine as bullion of certain value, without stating the amount, it was his duty to treat it as the value in gold, and add thereto

151 *State of California v. Moore*,
12 Cal. 56.

152 *Tousey v. Bell*, 23 Ind. 423.

153 Nev. Const., Art. 10.

154 *State v. Kruttschnitt*, 4 Nev.
178.

155 Nev. Stats. 1867, p. 159.

156 *State v. Kruttschnitt*, 4 Nev.
178.

157 *Id.*

158 Nev. Stats. 1865, p. 271.

159 *State v. Kruttschnitt*, 4 Nev.
178.

160 Nev. Stats. 1867, p. 159.

a sufficient percentage to fix the paper money value, and if he omitted to do so, he was derelict in his duty.¹⁶¹

§ 6763. **Protest, recovery back.**—If the items of a person's property are assessed and valued separately, and some of the items are not liable to taxation, and the tax-collector can separate the legal from the illegal portion of the tax, he should receive the legal portion of the tax tendered him; and if he refuses to do so, and the whole tax is paid under protest, the person taxed can recover from the collector that portion which is illegal,¹⁶² unless he has turned the money over to the treasurer. The county is the real party defendant.¹⁶³ So, if the collector enforces the payment of a tax upon property outside of his district, a general protest will enable the party paying to recover it back.¹⁶⁴ Interest against the county can be allowed only from the date of judgment declaring the tax void.¹⁶⁵ The plaintiff in such action need not aver in his complaint the precise amount of money which was illegally exacted, but may recover a less amount than that stated in his complaint. If a public officer has notice of the facts which render a demand illegal, and exacts the payment thereof by coercion, a protest is not necessary to enable the party so paying to recover it back; but if the officer has no notice of such illegality, a protest is necessary. The protest must state the grounds upon which the protestor claims the demand is illegal.¹⁶⁶ To enable one to recover back a tax illegally assessed, and paid under protest, it must appear that the tax was delinquent and that the officer to whom it was paid was armed with authority, real or pretended, to seize the property, and threatened to do so.¹⁶⁷ In Wyoming, the board of county commissioners should direct the county treasurer to refund

¹⁶¹ *State v. Kruttschnitt*, 4 Nev. 178. As to taxation of the net proceeds of mines under the act of 1871, (Nev. Stats. 1871, p. 87), see *State v. Eureka Consol. Min. Co.*, 8 Nev. 15; *State v. Northern Belle etc. Co.*, 13 Nev. 250, 15 Nev. 385.

¹⁶² *Bank of Mendocino v. Chalfant*, 51 Cal. 369.

¹⁶³ *Craig v. Boone*, 146 Cal. 718, 81 Pac. 22.

¹⁶⁴ *Mason v. Johnson*, 51 Cal. 612.

¹⁶⁵ *Miller v. Kern County*, 150 Cal. 797, 90 Pac. 119.

¹⁶⁶ *Meek v. McClure*, 49 Cal. 623.

¹⁶⁷ *Bank of Santa Rosa v. Chalfant*, 52 Cal. 170. See *De Fremery v. Austin*, 53 Cal. 380. As to refunding of taxes erroneously or illegally collected, see Cal. Pol. Code, § 3804; *Hayes v. County of Los Angeles*, 99 Cal. 74, 32 Pac. 766. As to complaint in action to recover back license-tax, see *County of San Diego v. Seifert*, 97 Cal. 594, 32 Pac. 644; *Town of Hayward v. Pimental*, 107 Cal. 386, 40 Pac. 545.

erroneous or illegal taxes; but a demand therefor must first be made to make the county in default.¹⁶⁸

§ 6764. **Railroad companies.**—Lands granted to a railroad company by Congress, to aid in its construction, are not subject to state taxation until the company has complied with the condition upon which they were granted, and is entitled to a patent therefor.¹⁶⁹

§ 6765. **Real estate.**—An assessment of land to A. B. and all claimants “known and unknown,” is valid and effectual against the property, even if A. B. was neither the owner nor in possession of the property at the time of the assessment.¹⁷⁰ Where land is unoccupied, and the owner is unknown, it must be assessed to “unknown owners.”¹⁷¹ The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings.¹⁷² Lands owned by several persons as tenants in common may be assessed to them jointly.¹⁷³ If in assessing a city lot owned and occupied by the owner as a single lot, he assesses one part to the owner, and another part to unknown owners, the assessment to unknown owners is illegal.¹⁷⁴ An assessment to M. and D., and to all owners and claimants, known and unknown, and to all owners and claimants of any interest, present or future, therein, or any lien upon the same, was good under the act of 1854, as amended by the acts of 1857 and 1859.¹⁷⁵ The assessment should be to the known owner, or to the one holding record title, or, in absence of both such, to unknown owners.^{175a}

§ 6766. **Redemption.**—If sufficient money is paid to the county treasurer to redeem land sold for taxes, and the payment is made for the purpose of effecting a redemption, and a receipt is taken,

¹⁶⁸ *Carton v. Board of Commissioners*, 10 Wyo. 416, 69 Pac. 1013.

¹⁶⁹ *Central Pac. R. R. Co. v. Howard*, 51 Cal. 230. As to when the company is entitled to a patent, see same case.

¹⁷⁰ *O'Grady v. Barnhisel*, 23 Cal. 287.

¹⁷¹ *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

¹⁷² *Ferris v. Coover*, 10 Cal. 589.

¹⁷³ *People v. McEwen*, 23 Cal. 54.

¹⁷⁴ *Bidleman v. Brooks*, 28 Cal. 72.

¹⁷⁵ *Brunn v. Murphy*, 29 Cal. 326. But see, contra, as to the validity of such an assessment under the present California revenue laws, *Grimm v. O'Connell*, 54 Cal. 522; *Daley v. Ah Goon*, 1 West Coast Rep. 584. For statutes relative to the assessment of land, see Cal. Pol. Code, § 3627 et seq. ^{175a} Cal. Pol. Code, §§ 3635, 3636.

the redemption is effected, even if the receipt is not filed with the recorder and recorded.¹⁷⁶ The holder of a tax-title cannot insist that a redeemer has not made sufficient payment when the county has made a certificate to that effect.¹⁷⁷

§ 6767. **Remedy at law and equity.**—If a tax upon the franchise has been illegally imposed, or if upon the face of the proceedings a valid legal objection appears, the plaintiff has a perfect remedy at law, and a court of equity has no right to interpose.¹⁷⁸

§ 6768. **Remission of taxes.**—The legislature cannot authorize the board of supervisors of a county to remit a tax, or part of a tax, within a specified district; it is in violation of the provision which requires all property to be taxed.¹⁷⁹

§ 6769. **Right to mine.**—Where the assessor in making his assessment uses this language: "One mine of four thousand four hundred feet, situated on Last Chance Hill," it does not convey the idea that he was assessing or attempting to assess the fee of the land in which the mine was situated, but the possessory claim of the miner and right to mine on a certain lode or vein of ore. The meaning of this language is determined by common usage in this country.¹⁸⁰

§ 6770. **Rolling-stock of a railroad company.**—The rolling-stock of a railroad company running its trains over a section of road under an easement or license, without a vested interest in such road, is not liable to be taxed in the county where such section of road is situated, under a law which provides that the rolling-stock of a railroad company shall be taxed in the several counties, etc., *pro rata*, in proportion as the length of the main track in each county, etc., bears to the whole length of the road.¹⁸¹

¹⁷⁶ Cooper v. Shepardson, 51 Cal. 298.

¹⁷⁷ Meagher v. City of Sprague, 31 Wash. 549, 72 Pac. 108.

¹⁷⁸ De Witt v. Hays, 2 Cal. 463, 56 Am. Dec. 352; Robinson v. Gaar, 6 Cal. 273.

¹⁷⁹ Wilson v. Supervisors, 47 Cal. 91.

¹⁸⁰ State v. Real del Monte Silver Min. Co., 1 Nev. 523.

¹⁸¹ Cook County v. Chicago etc. R. R. Co., 35 Ill. 460.

§ 6771. **Sale for too much, void.**—If a sale of land for a delinquent tax is made for a sum in excess of the tax and legal costs, the sale is void unless the excess is less than the smallest fractional coin authorized by law.¹⁸²

§ 6772. **Spanish grant.**—A grant of three square leagues of land made by the Mexican government, to be selected within a large tract, is real estate liable to taxation, although not yet surveyed.¹⁸³

§ 6773. **Situs of personal property for taxation.**—To authorize the taking of personal property in any other county than that in which the owner resides, it must appear that such property is kept or maintained in such county, and is not there casually or in transit, or temporarily, in the ordinary course of commerce or business.¹⁸⁴ A steamboat whose owner resides in New York, and by whom it was sent to San Francisco and used in navigation within the state, is liable to assessment and taxation;¹⁸⁵ that it is taxed in New York is no ground that it should not be taxed in California. The property of all non-residents of the state may be taxed;¹⁸⁶ and if in the possession of a trustee or agent, it may properly be assessed to the trustee or agent in possession.¹⁸⁷

§ 6774. **State bond.**—Bonds of the state of California are personal property within the meaning of the revenue act, and are subject to taxation.¹⁸⁸

§ 6775. **Stock of the United States.**—Stock of the United States is not subject to taxation, and state laws to that end are unconstitutional, whether they impose the tax on the stock *eo nomine*, or include it in the aggregate of the taxpayer's property, to be valued at what it is worth. That portion of the capital which a bank has invested in the stocks, bonds, or other securities of the United States, is not liable to state taxation.¹⁸⁹

¹⁸² Treadwell v. Patterson, 51 Cal. 637.

¹⁸³ People v. Crockett, 33 Cal. 150.

¹⁸⁴ People v. Niles, 35 Cal. 282.

¹⁸⁵ Minturn v. Hays, 2 Cal. 590, 56 Am. Dec. 366.

¹⁸⁶ Id.

¹⁸⁷ People v. Home Ins. Co., 29

Cal. 533. As to situs of cattle for purpose of taxation in Nevada, see Barnes v. Woodbury, 17 Nev. 383, 30 Pac. 1068.

¹⁸⁸ People v. Home Ins. Co., 29 Cal. 533.

¹⁸⁹ Bank of Commerce v. New York, 2 Black, 620, 17 L. Ed. 451.

§ 6776. **Suit by tax-collector.**—A collector of taxes cannot compel payment by suit, except in those cases in which the statute expressly confers the right.¹⁹⁰

§ 6777. **Submission to illegal taxation.**—Mere submission to illegal taxation should not, except in an extreme case, be construed into a recognition, so as to estop the party taxed from denying it.¹⁹¹

§ 6778. **Tax-sale.**—Property sold for taxes must at the time of the sale be liable for the entire amount of tax for which it is sold, or the sale is void.¹⁹² A purchase of land, at a sale of the same for taxes, by the agent of one who was in possession thereof, either by himself or his tenants, does not pass or otherwise affect the title to such land.¹⁹³

§ 6779. **Tax-sale—Injunction.**—A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings that the sale would be void.¹⁹⁴

§ 6780. **Title.**—If a person is in possession of land, claiming the same as his own, it is his duty to pay the taxes, although he has no paper title, and is a trespasser; and under such circumstances he cannot acquire an outstanding title by purchasing at a tax-sale. The rule is the same if the possession is such that it would give the possessor title by the statute of limitations.¹⁹⁵ The title acquired by the later sale for taxes must prevail over that acquired by a sale for taxes of a prior year.¹⁹⁶

§ 6781. **Tax, where payable.**—Taxes are payable in the county where property is first assessed. The payment of a second assessment on the same property, after a removal to another place, is not a discharge of the former.¹⁹⁷

¹⁹⁰ Packard v. Tisdale, 50 Me. 376.

¹⁹¹ Langworthy v. Dubuque, 13 Iowa, 86.

¹⁹² Bucknall v. Story, 36 Cal. 67.

¹⁹³ Bernal v. Lynch, 36 Cal. 135; citing Kelsey v. Abbott, 13 Cal. 609; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; McMinn v. Whelan, 27 Cal. 318; Coppinger v. Rice, 33 Cal. 408.

¹⁹⁴ Bucknall v. Story, 36 Cal. 67; Dean v. Davis, 51 Cal. 406; Houghton v. Austin, 47 Cal. 647.

¹⁹⁵ Barrett v. Amerein, 36 Cal. 322. See, also, Garwood v. Hastings, 38 Cal. 216.

¹⁹⁶ Chandler v. Dunn, 50 Cal. 15.

¹⁹⁷ People v. Holladay, 25 Cal. 300.

§ 6782. **Time—Assessment ended.**—A complaint in an action to recover unpaid taxes is sufficient if it avers “that certain sums are due for certain taxes levied in the year 1858 upon certain real estate assessed in the year 1858,” without stating that these taxes were levied under an assessment ending on the first day of March, 1858.¹⁹⁸

§ 6783. **Unauthorized alterations in assessment-roll.**—An assessor has no power to make an alteration in the assessment-roll after it has passed out of his hands. The roll in its original state is the proper assessment-roll, and when it remained legible, as originally made, an unauthorized alteration does not avoid it, and it is competent evidence on the alteration being accounted for.¹⁹⁹

§ 6784. **United States land.**—Lands belonging to the United States are not liable to taxation by the state, under the revenue laws of California or the act of Congress admitting the state of California into the Union.²⁰⁰

§ 6785. **Validity of tax.**—A tax, in order to be valid, must rest upon an assessment made in the mode prescribed by law, by the duly elected assessor.²⁰¹ And when the owner is known the assessment must be made against him. Assessment must be certain as to person, property, and amount.²⁰²

§ 6786. **Validity of tax of personal property.**—Personal property may be assessed in bulk, without statement of character of property. Assessment of personal property of a former member of the firm, made to the firm after its dissolution, is void.²⁰³ Personal property may be assessed to a non-resident.²⁰⁴ Assessing personal property to a wrong owner does not invalidate the assessment.²⁰⁵ A mortgage on such cannot be assessed, but the assessment should be made of the debt which the mortgage was given to secure.²⁰⁶

198 *People v. Todd*, 23 Cal. 181.

199 *State v. Manhattan Co.*, 4 Nev. 318.

200 *People v. Morrison*, 22 Cal. 73.

201 *People v. Hastings*, 29 Cal. 449.

202 *Kelsey v. Abbott*, 13 Cal. 609.

203 *People v. Sneath*, 28 Cal. 612.

204 *People v. Home Ins. Co.*, 29 Cal. 533.

205 *Id.*

206 *People v. Eastman*, 25 Cal. 601.

§ 6787. **Value.**—An assessment of town lots which does not give their value either in gross or in detail is radically defective.²⁰⁷ The only remedy for over-valuation is by appeal to the board of equalization. It is no defense against collection of the tax;²⁰⁸ but, in Nevada, it seems that the defense of excessive valuation may be raised.²⁰⁹ An assessment is void where there is no valuation.²¹⁰ An allegation that property was assessed “in an amount greatly in excess of that authorized by law” is insufficient to raise any issue as to the true cash value of the property, and to raise such issue such value should be alleged.²¹¹

§ 6788. **Verification.**—The acts in relation to the collection of delinquent taxes which compel the defendant to verify his answer do not change the rule in section 46 of the Practice Act,²¹² that where a complaint is not verified a general denial of its allegations in the answer will put in issue all the material allegations.²¹³

§ 6789. **Complaint in action to collect license-tax.**—The complaint in an action brought by the district attorney to collect a license-tax, under an ordinance which provides that the tax-collector may direct such suits to be brought, need not allege that the action was brought under an authorization by the tax-collector. The district attorney, being an attorney at law, is presumed to be authorized by the proper party to institute the actions he may bring, in the absence of evidence to the contrary.²¹⁴ A license fee or charge for the transaction of any business is a tax within the meaning of the term “tax” as employed in section 5 of article VI of the California constitution of 1879, and in section 838 of the California Code of Civil Procedure, governing the transfer of cases from a justice court to the superior court.²¹⁵

²⁰⁷ Hurlbutt v. Butenop, 27 Cal. 50.

²⁰⁸ City of Los Angeles v. Glassell, 4 Cal. App. 43, 87 Pac. 241.

²⁰⁹ State v. Carson etc. Ry. Co., 29 Nev. 487, 91 Pac. 932.

²¹⁰ People v. San Francisco Sav. Union, 31 Cal. 132; cited in Garwood v. Hastings, 38 Cal. 216.

²¹¹ State v. Sadler, 21 Nev. 13 23 Pac. 799.

²¹² Cal. Code Civ. Proc., § 437.

²¹³ Rowley v. Howard, 23 Cal. 401.

²¹⁴ San Luis Obispo v. Hendricks, 71 Cal. 242, 11 Pac. 682.

²¹⁵ City of Santa Barbara v. Stearns, 51 Cal. 499.

§ 6790. **Complaint to set aside tax-sale.**—A complaint in an action to set aside a tax-sale of lands sold for a certain sum, a portion of which is claimed to be excessive as embracing an item of personal tax, is not demurrable as ambiguous or uncertain in failing to state the excessive portion where the precise amount can be ascertained by computation.²¹⁶

§ 6791. **Complaint in action against assessor.**—A complaint against a county assessor, and the sureties upon his official bond, alleging that the assessor willfully and against law assessed a tract of land belonging to the plaintiff at an unlawful and false valuation specified, which was largely in excess of a sum alleged to be its highest actual value for agricultural purposes, to the plaintiff's damage in a specified sum, does not state a cause of action. The averment of the value of the property is insufficient, as its value for all purposes must be considered by the assessor in ascertaining the amount at which it would be taken in payment of a just debt due from a solvent debtor, which constitutes its full cash value; and the averment that the assessment was willful and against law, without an averment that he acted maliciously, and with intent to wrong and injure the owner of the property, does not negative the presumption that he simply erred in judgment, for which he is not liable to an action, the only remedy for such error being by application to the board of equalization.²¹⁷ As against a general demurrer, an allegation that an assessment was willfully and unlawfully made, was grossly unjust and unequal, and was made with the knowledge of the assessor that it would greatly wrong plaintiff, does not show a fraudulent assessment.²¹⁸

§ 6792. **Complaint—Recovery of illegal assessment.**—In an action to recover an assessment of an irrigation district paid under duress, an averment in the complaint that the assessment was levied without calling a special election or submitting the question to the qualified electors of the district, and that no election was held authorizing the levy, should not be stricken

²¹⁶ Ward v. Commissioners, 12 Mont. 23, 29 Pac. 658.

²¹⁷ Ballerino v. Mason, 83 Cal. 447, 23 Pac. 530.

²¹⁸ Kern Valley Water Co. v. Kern County, 137 Cal. 511, 70 Pac. 476.

from the complaint, and the plaintiff should be allowed to prove the averment.²¹⁹ A taxpayer may recover back any excess over the legal assessment, where paid by mistake in accounting.²²⁰ And he is not precluded from suing the county therefor because of the provision that the taxes may be refunded by the county treasurer upon order of the board of supervisors.²²¹

§ 6793. Action to quiet title against tax-sale.—The Oregon statutory remedy is an enlargement of the equitable remedy to remove a cloud, so that it may be invoked without waiting for possession to be disturbed by legal proceedings, and also affords relief against void instruments, such as tax-sale certificates, void on their face, or which would necessarily reveal their invalidity if an attempt were made to enforce them. These, by the ordinary equitable remedy not constituting a cloud, because of their patent invalidity, cannot constitute the basis of an action.²²²

The suit may be either a technical suit to remove the cloud, or the action provided for in the code, providing that, where a party is in possession of realty, he may maintain a suit to determine adverse claims thereto.²²³ A suit by a person out of possession to redeem from a tax-sale, and to have his title quieted on the ground that a tax-lien is void, is not technically a suit to quiet title, and is not therefore objectionable for want of possession by plaintiff.²²⁴ A purchaser on a mortgage sale is entitled to possession,²²⁵ and is therefore entitled to maintain a suit in equity to cancel a tax-deed as a cloud on his title.²²⁶ The owner also has a full and complete protection against creation of a cloud on his title by a suit to enjoin the execution of the tax-deed.²²⁷

§ 6794. Limitations of action.—Although the statute of limitations applies only to suits, and therefore not to the liens of a certificate of tax-sale, foreclosed without suit by the issue of the

²¹⁹ *Tregea v. Owens*, 94 Cal. 317, 29 Pac. 643.

²²⁰ *Pacific Coast Co. v. Wells*, 134 Cal. 471, 66 Pac. 657.

²²¹ *Stewart Law etc. Co. v. Alameda County*, 142 Cal. 660, 76 Pac. 481.

²²² *Moore v. Clackamas County*, 40 Or. 536, 67 Pac. 662.

²²³ *Id.*

²²⁴ *Carson v. Titlow*, 38 Wash. 196, 80 Pac. 299.

²²⁵ Wash. Bal. Codes, § 5500; Laws 1899, p. 93, § 15.

²²⁶ *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786.

²²⁷ *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102.

tax-collector's deed, and in no other way, yet the certificate may be declared void in a suit against its owner to quiet title, if the plaintiff has acquired title by adverse possession after issuance of the certificate.²²⁸ A tax-deed valid on its face may be impeached by way of defense, though the five-year limitation prescribed by the tax law has elapsed.²²⁹ In Oregon, a suit to recover land sold for taxes must be commenced within three years from the recording of the tax-deed;²³⁰ but this does not apply in case the deed is void on its face.²³¹

§ 6795. Action on tax-title.—A void tax-deed is not *prima facie* evidence of title, and cannot form the basis for affirmative relief.²³² The party setting up title by tax-deed must show that all the requirements of the law have been complied with.²³³ A tax-deed invalid on its face may be set aside, even after five years.²³⁴ A grantee in a deed agreeing to pay all the taxes due upon the land may object to excessive taxes, and demand the cancellation of a tax-deed obtained at the sale of land where a part of the taxes are excessive.²³⁵ The owner of land sold for unpaid taxes cannot purchase the same as an innocent purchaser.²³⁶

§ 6796. Tender of taxes precedent to action.—In a suit to quiet title against one holding under a void tax-title it is unnecessary to pay or tender any taxes paid.²³⁷ Plaintiff is bound only to tender the amount due when the property was first sold to the county, together with any taxes assessed and matured since the sale, with penalties and interest, and not the amount paid by the purchaser at the tax-sale.²³⁸ It is not necessary that the tender of the taxes should be paid into court.²³⁹

²²⁸ Crocker v. Dougherty, 139 Cal. 521, 73 Pac. 429.

²²⁹ Stump v. Burnett, 67 Kan. 589, 73 Pac. 894; Thompson v. Colburn, 68 Kan. 819, 75 Pac. 508.

²³⁰ Or. B. & C. Codes, § 3146.

²³¹ Lewis v. Blackburn, 42 Or. 114, 69 Pac. 1024.

²³² Seaverns v. Costello, 8 Ariz. 308, 71 Pac. 930.

²³³ Asper v. Moon, 24 Utah, 241, 67 Pac. 409.

²³⁴ Gibson v. Kueffer, 69 Kan. 534, 77 Pac. 282.

²³⁵ Cramer v. Armstrong, 28 Colo. 496, 66 Pac. 889; Blackburn v. Lewis, 45 Or. 422, 77 Pac. 746.

²³⁶ Rothchild Bros. v. Rollinger, 32 Wash. 307, 73 Pac. 367.

²³⁷ Longworth v. Johnson, 66 Kan. 193, 71 Pac. 259; Shinkle v. Meek, 69 Kan. 368, 76 Pac. 837; Title Trust Co. v. Aylsworth, 40 Or. 20, 66 Pac. 276.

²³⁸ Young v. Droz, 38 Wash. 648, 80 Pac. 810.

²³⁹ McManus v. Morgan, 38 Wash. 528, 80 Pac. 786.

In a suit to restrain a tax-sale or a tax-collection, or to recover property sold for taxes, plaintiff must tender the taxes.²⁴⁰

If defendant is properly entitled to a part of the land, the taxes upon the part sued for alone may be tendered as a sufficient tender to warrant suit therefor.²⁴¹ Plaintiff holding under a mortgage foreclosure sale need not tender taxes in quieting title as against a tax assessed after execution of the mortgage.²⁴²

A judgment in favor of plaintiff, canceling a tax-deed, should provide for the repayment to defendant by plaintiff of the amount admitted or found due defendant for taxes paid by defendant, together with interest, penalties, and subsequent taxes paid.²⁴³ Much the same rule applies to improvements, if put on after receipt of the tax-deed,²⁴⁴ and a lien lies therefor.²⁴⁵ Where a tax-deed is set aside for irregularity, the holder thereof is entitled to a lien on the land for the taxes on account of which it was sold and taxes subsequently paid thereon.²⁴⁶ The property not having been assessed, there is no obligation to tender taxes thereon.²⁴⁷

§ 6797. The complaint.—A complaint alleging that prior to the commencement of the action the plaintiff caused to be tendered to defendant as such purchaser the amount of all taxes, penalty, interest, and costs as purchaser at the sale, but that the defendant refused to receive the payment, is a sufficient allegation of tender.²⁴⁸ One who pleads a tender of the amount paid by the purchaser for his tax-deed is estopped from contesting the validity of the tax for the non-payment of which the premises were sold.²⁴⁹

²⁴⁰ Wash. Bal. Codes, § 5678; *Dennan v. Steinbach*, 29 Wash. 179, 69 Pac. 751.

²⁴¹ *Brentano v. Brentano*, 41 Or. 15, 67 Pac. 922.

²⁴² *Ferguson v. Kaboth*, 43 Or. 414, 73 Pac. 200, 74 Pac. 466.

²⁴³ *Foster v. Bender*, 28 Mont. 526, 73 Pac. 121; *Clark v. Knox*, 32 Colo. 342, 76 Pac. 372; *Pueblo Realty Trust Co. v. Tate*, 32 Colo. 67, 75 Pac. 402.

²⁴⁴ *Uhl v. Grissom*, 12 Okla. 322, 72 Pac. 372.

²⁴⁵ *Silver Queen Min. Co. v. Crocker*, 8 Ariz. 397, 76 Pac. 479.

²⁴⁶ *Paine v. Palmborg*, 20 Colo. App. 432, 79 Pac. 330.

²⁴⁷ *Clark v. Maher*, 34 Mont. 391, 87 Pac. 272.

²⁴⁸ *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786.

²⁴⁹ *Conklin v. Cullen*, 29 Mont. 38, 74 Pac. 72.

FORMS—TAXES AND TAXATION.

§ 6798. Complaint against person removed to another county—
Under California statute.

Form No. 1817.

[TITLE OF COURT.]

A. B., Assessor of . . . County,	}
in the State of California,	
Plaintiff	
v.	
C. D.,	}
Defendant.	

The plaintiff complains, and alleges:

I. That he is the assessor of said county of

II. That there was duly assessed upon personal property of the said defendant in the said county of . . . , the sum of . . . dollars for county purposes; and the further sum of . . . dollars for state purposes, for the year 19.., upon which said several taxes there has accrued a penalty of . . . per cent for the non-payment, together with interest on the said taxes at the rate of . . . per cent per month, from the . . . day of . . . , 19.., all which said several taxes, penalties, and interest remain wholly unpaid.

III. Said taxes were assessed upon the following property, to-wit: [Enumerate or briefly describe the property as in the assessment-list.]

IV. That at the time said taxes were assessed upon said property, the defendant resided in the said county of . . . , and afterwards, to-wit, on or about the . . . day of . . . , 19.., removed therefrom to the said county of . . .

Wherefore, the plaintiff, as such assessor, demands judgment against the said defendant for the sum of . . . dollars, being the amount of said taxes, penalties, and interest aforesaid, and costs of suit.

§ 6799. Complaint for taxes assessed in city and county of San Francisco, under act of March 19, 1878.

Form No. 1818.

[TITLE OF COURT.]

The City and County of San Fran-	}
cisco,	
Plaintiff,	
v.	
John Doe,	Defendant.

The plaintiff complains, and alleges:

I. That the defendant is indebted to the plaintiff in the sum of . . . dollars, for city and county taxes, with [five] per cent penalty added thereto for the non-payment thereof, and interest thereon at the rate of [two] per cent per month from the . . . day of . . . , 19.., and . . . dollars costs of advertising, and is also indebted in the further sum of . . . dollars, for state taxes, with [five] per cent penalty added thereto for the non-payment thereof, and interest thereon at the rate of [two] per cent per month from the . . . day of . . . , 19.., and . . . dollars, costs of advertising, which said taxes were duly assessed and levied upon personal property, to-wit [enumerating the property], for the fiscal year [naming it].

Wherefore, plaintiff prays judgment for said several sums, with interest thereon as aforesaid, and costs of suit, all in United States gold coin.

A. B., Special Counsel for Plaintiff.

§ 6800. Complaint for tax over three hundred dollars, under section 3899 of California Political Code.

Form No. 1819.

[TITLE OF COURT.]

People of the State of California,	}
Plaintiff,	
v.	
John Doe,	Defendant.

The plaintiff complains, and alleges:

I. That the defendant is indebted to plaintiff in the sum of . . . dollars, state and county taxes for the fiscal year 19.., with [state penalties] added for the non-payment of such taxes, and . . . dollars, cost of collection, to date.

Wherefore, plaintiff demands judgment for said several sums, and prays that an attachment may issue in form as prescribed in section 540 of the Code of Civil Procedure.

[Signed by controller, or attorney-general.]

§ 6801. Complaint for state and county tax—Known owners.

Form No. 1820.

[TITLE OF COURT.]

The County of . . . ,	} Plaintiff,
v.	
James Jones, John Doe, and	
Richard Roe,	
	Defendants.

The plaintiff, by E. F., district attorney of the county of . . . , complains of James Jones, John Doe, and Richard Roe:

I. That between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., A. B., in the county of . . . , in said state . . . , then and there being county assessor of said county, did duly assess and set down upon an assessment-roll all the property, real and personal, in said county subject to taxation; that said assessment-roll was afterwards submitted to the board of equalization of said county, and was by said board duly equalized, as provided by law; that the said James Jones was then and there the owner of, and that there was duly assessed to him, the following-described real estate, improvements upon real estate, certain personal property [state kinds], and also certain dogs, to-wit:

Said real estate, valued and so assessed at \$

Said improvements, valued and so assessed at \$

Said personal property, valued and so assessed at \$

II. That each of the other persons, defendants herein, have and claim a title to and an interest in said real estate, improvements on real estate and personal property, and are liable for and in duty bound to pay the taxes herein specified; that upon said property there has been duly levied for the fiscal year A. D. 19..,—

A state tax of.....	\$
A county tax of.....	\$
A tax on said dogs.....	\$
Amounting in the whole to	\$

All of which is due and unpaid; of which amount . . . dollars was duly assessed and levied against the real estate aforesaid, and . . . dollars against the improvements aforesaid.

Wherefore, said plaintiff prays judgment against said persons, defendants herein, for the sum of . . . dollars, and separate judgment against said real estate and improvements for the sum of . . . dollars, and that said real estate and improvements be sold to satisfy such separate judgment, and that all the interest and claim of each person aforesaid, defendants herein, and all persons claiming any interest in said real estate or improvements, be forever barred and foreclosed, and that said taxes, and all costs subsequent to the assessment of said tax, and all costs and expenses of this suit be paid in gold and silver coin of the United States; and plaintiff prays for such other judgment as to justice belongs.

E. F., District Attorney,

County of . . .

§ 6802. The same—Under statute of April 23, 1880.

Form No. 1821.

[TITLE OF COURT.]

The County of . . . ,	} Plaintiff, Defendant.
v.	
John Doe,	

The plaintiff complains, and alleges:

I. That defendant is indebted to plaintiff in the sum of . . . dollars [naming the amount for county, or city and county] taxes, with [five] per cent penalty added thereto for the non-payment thereof, and interest thereon at the rate of [two] per cent per month from the . . . day of . . . , 19.., and fifty cents cost of advertising. Plaintiff further avers that defendant is indebted to plaintiff in the further sum of . . . dollars, for state taxes, with [five] per cent penalty added thereto for the non-payment thereof, and interest thereon at the rate of [two] per cent per month from the . . . day of . . . , 19.., and fifty cents costs of advertising, which said taxes were duly assessed and levied upon the [real or personal] property of said defendant, to-wit, [describe property as assessed], for the fiscal year 19..

Wherefore, plaintiff prays judgment against said defendant for said several sums, with interest and penalty as aforesaid, and costs of suit.

§ 6803. Complaint for state and county tax—Unknown owner.

Form No. 1822.

[STATE AND COUNTY.]

[COURT.]

The County of . . . ,	Plaintiff,
v.	
Doe No. . . . , John Doe, and Richard Roe, and the real estate and improvements hereinafter described,	Defendants.

The people of the state of California, by E. F., district attorney of the county of . . . , complain of Doe No. . . . , John Doe, and Richard Roe, whose real names are to plaintiffs unknown, and who are, therefore, sued by the fictitious names last aforesaid; and also the following-described real estate and improvements, to-wit, [describe real estate with same particularity, as in action of ejectment], and all and every part and parcel of improvements on said land; and for cause of action say:

I. That between the . . . day of . . . , 19.., and the . . . day of . . . , 19.., in the county of . . . , in the state of . . . , A. B., then and there being county assessor of said county, did duly assess and set down upon an assessment-roll all the property, real and personal, in said county subject to taxation; that said assessment-roll was afterwards submitted to the board of equalization of said county, and was by said board duly equalized, as provided by law; that the same Doe No. . . . , John Doe, and Richard Roe were, at the time the said property was so assessed, and still are, owners of the land and improvements above described, and were at the time said assessment was made absent therefrom and from the said county, and were during all the time aforesaid, and still are, liable for and in duty bound to pay the taxes herein specified; that the names of the owners of the said land and improvements, and the names of the defendants last aforesaid, were, during all the time aforesaid, and still are, unknown to the said assessor, and unknown to the said plaintiffs, and the above-described lands and improvements were so assessed

tempt to carry on, and did then and there carry on, the business of [designate business], and the said defendant was then and there required by the provisions of an act entitled "An act to provide revenue for the support of the government of this state," approved on the . . . day of . . . , 19.., to take out a license thereto, in pursuance of the said act. And the said defendant then and there so attempted to carry on and so carried on said business without such license and without any license thereto. And the said defendant did then and there unlawfully fail, neglect, and refuse to take out the license in such case by said act provided, and still neglects and refuses so to do. And by reason of the premises the sum of . . . dollars then and there became and was due from the said defendant, and payable by him to the collector of taxes of the said county [or license collector, as the case may be], and the said defendant, although often requested to do so, has not paid the said sum of money or any part thereof; but has hitherto wholly neglected and refused, and still refuses, to pay the same.

Wherefore, said plaintiff asks judgment against said defendant, for said sum of . . . dollars, together with . . . dollars damages, as by said act provided, and the costs of this suit.

E. F., District Attorney.

CHAPTER CLII.

EMINENT DOMAIN.

§ 6805. **Power of, generally.**—The power of eminent domain is one of the inalienable incidents of sovereignty, which may be exercised in favor of public uses over any and all property, private, and even public.¹ In Washington, the power of eminent domain is recognized, but not granted, by the constitution.² But this power is to be exercised under and by virtue of the legislative will as expressed by the law-making power, and the right to exercise it must be given expressly or by necessary implication from power expressly given.³ The determination as to whether or not the power shall be exercised, and as to what lands are necessary to be taken, is a political and legislative question, and not a judicial one. If the use is a public use, the power of the court is confined to seeing that the burdens cast upon the citizen are in conformity with the methods prescribed by the legislature, and that those methods are not in conflict with the fundamental rights of the people.⁴

§ 6806. **Nature of condemnation proceedings.**—Condemnation proceedings are purely statutory and special in their character, and strict compliance with the requirements of the statute is essential.⁵ The proceedings can be instituted only under the particular statutes which warrant them, and the right is limited to those who seek to take the property belonging to others.⁶ The

¹ See *Gilmer v. Lime Point*, 18 Cal. 229; *Moran v. Ross*, 79 Cal. 159, 21 Pac. 547; *Woodmere Cemetery v. Roulo*, 104 Mich. 595, 62 N. W. 1010; *Hollister v. State*, 9 Idaho, 8, 71 Pac. 541.

² *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670.

³ *Southern Pacific R. R. Co. v. Southern Cal. Ry. Co.*, 111 Cal. 221, 43 Pac. 602; *Boston etc. R. R. Co. v. Lowell etc. R. R. Co.*, 124 Mass. 368; *Barre R. R. Co. v. Montpelier etc. R. R. Co.*, 61 Vt. 1, 15 Am. St. Rep. 877, 17 Atl. 923, 4 L. R. A. 785.

⁴ *Wulzen v. Board of Supervisors*,

101 Cal. 15, 40 Am. St. Rep. 17, 35 Pac. 353. As to the right of eminent domain in California, see *Cal. Code Civ. Proc.*, §§ 1254, 1257. In whose behalf the right may be exercised, see *Cal. Code Civ. Proc.*, § 1238.

⁵ *Knoth v. Barclay*, 8 Colo. 300, 6 Pac. 924; *Colorado Cent. R. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605; *Lewis v. St. Paul etc. R. R. Co.*, 5 S. Dak. 148, 58 N. W. 580; *State v. Superior Court*, 36 Wash. 381, 78 Pac. 1011; *Colorado Fuel etc. Co. v. Four-Mile Ry. Co.*, 29 Colo. 90, 66 Pac. 902.

⁶ *Colorado etc. R. R. Co. v. Ruedi*, 2 Colo. App. 202, 29 Pac. 1034. See

provisions of the constitution are not self-executing, but the procedure is provided by the legislature.⁷

Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a taking, within section 22 of article I of the constitution of Utah, providing that private property shall not be taken or damaged for public use without just compensation, to the extent of the damage suffered, even though the title and possession of the owner remain undisturbed.⁸ In the absence of proof that the burden imposed on a property-owner by a municipal assessment is altogether out of proportion to the benefit actually accruing to the property, he cannot assert that his property is thereby taken without compensation.⁹

§ 6807. **Jurisdiction.**—The superior court has jurisdiction of a proceeding by a street-railway company for the condemnation of certain land for a right of way.¹⁰ An action to condemn land for a ferry is properly brought in the county in which the land is situated.¹¹ Proceedings to condemn water appropriated for irrigation purposes may be brought and tried in the county in which the land is situated, though the water is to be taken in another county.¹² In a proceeding by a railroad to condemn land held under contract from the state, and over which a waterway company held a right of way, failure to make the state and the waterway company parties did not deprive the court of jurisdiction as to those holding under contract.¹³

The judgment of the legislature in conferring the power of eminent domain is not conclusive upon the courts, but it is entitled to great weight.¹⁴

Heiser v. New York, 104 N. Y. 68, 9 N. E. 866; Fremont etc. R. R. Co. v. Mattheis, 35 Neb. 48, 52 N. W. 698.

⁷ Potlatch Lumber Co. v. Peterson, 12 Idaho, 769, 118 Am. St. Rep. 233, 88 Pac. 426.

⁸ Stockdale v. Rio Grande Western Ry. Co., 28 Utah, 201, 77 Pac. 849.

⁹ McMillan v. City of Butte, 30 Mont. 220, 76 Pac. 203.

¹⁰ State v. Superior Court, 30 Wash. 219, 232, 70 Pac. 484; Beaulieu Vd. Co. v. Superior Court, 6 Cal. App. 242, 91 Pac. 1015.

¹¹ Pool v. Simmons, 134 Cal. 621, 66 Pac. 872; City of Santa Rosa v. Fountain Water Co., 138 Cal. 579, 71 Pac. 1123.

¹² City of Helena v. Rogan, 26 Mont. 452, 68 Pac. 798; State v. District Court, 29 Mont. 153, 74 Pac. 200.

¹³ State v. Superior Court, 31 Wash. 445, 72 Pac. 89, 66 L. R. A. 897.

¹⁴ Tanner v. Treasury Tunnel Min. etc. Co., 35 Colo. 593, 83 Pac. 464, 4 L. R. A. (N. S.) 106.

§ 6808. **Complaint.**—The necessity for taking land for a freight depot is sufficiently pleaded by alleging such an increase in traffic that the present facilities are inadequate, that it is necessary to construct and maintain the freight-house as an adjunct or appendage to the railroad adjoining such station, and that it was necessary that the land in question be taken for that purpose.¹⁵ The manner in which the proposed road is to be constructed, being a matter of possible subsequent damage, need not be set out in the complaint.¹⁶ The complaint must show a necessity for public use.¹⁷

In the condemnation of a way for an irrigation ditch, a description of the definite route and dimensions of the ditch sufficiently describe the quantity of the land.¹⁸

§ 6809. **Complaint or petition.**—Condemnation proceedings under the South Dakota statute must be in writing, and made a matter of record. The jurisdiction of the judge to act must be affirmatively shown by a proper petition stating the jurisdictional facts.¹⁹ The petition should show the value of the property sought to be taken or the amount involved in the proceeding.²⁰ So, the necessity of the use for which the condemnation is sought must be alleged.²¹ But no statement that the proposed location of a railroad is compatible with the greatest public good and the least private injury is required.²² A complaint by a city to condemn land to widen a street which does not aver, nor show by the ordinance set forth therein, that the taking is necessary is insufficient.²³ But where the complaint contained no averment that the land in question had been appropriated to a public use, it was held sufficient on demurrer without alleging

15 *Central Pacific Ry. v. Feldman*, 152 Cal. 303, 92 Pac. 849.

16 *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972; *Boca & L. R. Co. v. Sierra Valley Ry. Co.*, 2 Cal. App. 546, 84 Pac. 298.

17 *Hercules Water Co. v. Fernandez*, 5 Cal. App. 726, 91 Pac. 401.

18 *Fulton v. Methow Trading Co.*, 45 Wash. 136, 88 Pac. 117; *State v. Superior Court*, 45 Wash. 321, 88 Pac. 334.

19 *Lewis v. St. Paul etc. Ry. Co.*, 5 S. Dak. 148, 58 N. W. 580. As to

jurisdiction of superior court to entertain the proceeding, see *Bishop v. Superior Court*, 87 Cal. 226, 25 Pac. 435.

20 *Colorado Cent. R. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605. See *San Diego Land Co. v. Neale*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604.

21 *Helena v. Harvey*, 6 Mont. 114, 9 Pac. 903.

22 *San Francisco etc. Ry. Co. v. Leviston*, 134 Cal. 412, 66 Pac. 473.

23 *Sanford v. City of Tucson*, 8 Ariz. 247, 71 Pac. 903.

that the land was required for a more necessary public use.²⁴ In a proceeding to condemn a right of way for a railroad company, the complaint must contain a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire tract.²⁵ Extreme accuracy is required in the description of the property sought to be acquired, and there must be no uncertainty in such description or in the degree of interest sought to be acquired.²⁶ The sufficiency of a petition for the laying out of a road is not impaired by its asking the abandonment of an old road as well as the laying out of the new one.²⁷ A complaint is insufficient when it fails to show that the use for which condemnation is sought is a public use, and uncertain when not showing definitely what water-rights are proposed to be condemned.²⁸

§ 6810. **Amendment of petition.**—The court has full power to grant leave to amend a petition in condemnation proceedings whenever it shall be of the opinion that justice may require it.²⁹ And a petition which is insufficient by reason of a defective jurisdictional averment, may be amended so that the court may have jurisdiction of the subject-matter thereafter.³⁰

§ 6811. **Verification.**—The petition need not be verified when not so required by the statute. When the proceeding is brought in the name of a county, the answer need not be verified.³¹

§ 6812. **Parties defendant.**—It is not necessary that the complaint make all the owners or alleged owners parties defendant.

²⁴ Lake Pleasanton Water Co. v. Contra Costa Water Co., 67 Cal. 659, 8 Pac. 501.

²⁵ California Cent. Ry. Co. v. Hooper, 76 Cal. 404, 18 Pac. 599. As to sufficiency of complaint in action by "railroad committee" to secure rights of way, see Judson v. Gage, 91 Cal. 304, 27 Pac. 676. As to sufficient allegation of termini of proposed railway, see California etc. R. R. Co. v. Southern Pacific Ry. Co., 67 Cal. 59, 7 Pac. 123; Bryan v. Moore, 81 Ind. 13.

²⁶ In re New York etc. R. R. Co., 70 N. Y. 191; Matter of Water Commrs., 96 N. Y. 351; Metropoli-

tan etc. Ry. Co. v. Dominick, 55 Hun, 198, 8 N. Y. Supp. 151.

²⁷ Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

²⁸ Aliso Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537. For instances of sufficient averment of a public use, see Cummings v. Peters, 56 Cal. 593; Rialto Irr. Dist. v. Brandon, 103 Cal. 384, 37 Pac. 484.

²⁹ Contra Costa R. R. Co. v. Moss, 23 Cal. 323.

³⁰ Southwestern Land Co. v. Hickory Jackson Ditch Co., 18 Colo. 489, 33 Pac. 275.

³¹ Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700.

If they have notice, they may defend their own interests.³² And this rule applies to a purchaser pending the condemnation proceedings.³³ Failure to notify part of the owners does not affect the proceedings as to those notified,^{33a} or those who appear.³⁴

§ 6813. **Answer.**—An answer is not necessary, and the striking out of one filed in condemnation proceedings is not error.³⁵ Neither the general provisions of the Code of Procedure nor the special provisions relating to condemnation proceedings require defendant to set up his claim for damages in an answer by way of counterclaim, even as to parts of his land not actually traversed by the railroad.³⁶ Plaintiff cannot object that defendants failed to answer.³⁷ If the allegations of the complaint are put in issue, findings must be made upon every material issue.^{37a} The great expense of a condemnation proceeding is no defense for appropriating property without the proceeding.³⁸

§ 6814. **Matters of practice—Generally.**—A proceeding for the condemnation of land is not commenced under the California statute until the issuance of summons.³⁹ In California, it is the duty of the owner of the land to allege and prove its value, and the burden of proof as to the value is upon him.⁴⁰ Under the constitution and statutes of Washington, the petitioner in a proceeding to appropriate lands for right of way has the right to open and close, both in the presentation of proof and the argument to the jury, as the burden rests upon him to show not only the necessity for the taking but the reasonable value of the land appropriated.⁴¹ Under the Colorado statute, the ques-

³² Utah Rev. Stats., § 3595; *Brigham City v. Chase*, 30 Utah, 410, 85 Pac. 436.

³³ *Id.*

^{33a} *City of Petaluma v. White*, 152 Cal. 190, 92 Pac. 177.

³⁴ *County of San Luis Obispo v. Simas*, 1 Cal. App. 175, 81 Pac. 972.

³⁵ *State v. Superior Court*, 42 Wash. 675, 85 Pac. 669.

³⁶ *Yellowstone Park R. R. Co. v. Bridges Coal Co.*, 34 Mont. 545, 115 Am. St. Rep. 546, 87 Pac. 963.

³⁷ *Id.*

^{37a} *Beaulieu Vd. Co. v. Superior*

Court, 6 Cal. App. 242, 91 Pac. 1015.

³⁸ *Williams v. Los Angeles Ry. Co.*, 150 Cal. 592, 89 Pac. 330.

³⁹ *Pacific Coast Ry. Co. v. Porter*, 74 Cal. 261, 15 Pac. 774.

⁴⁰ *San Diego Land etc. Co. v. Neale*, 88 Cal. 50, 25 Pac. 977, 11 L. R. A. 604; *Monterey County v. Cushing*, 83 Cal. 507, 23 Pac. 700. Also, *Colorado Cent. R. R. Co. v. Allen*, 13 Colo. 229, 22 Pac. 605.

⁴¹ *Bellingham Bay etc. R. R. Co. v. Strand*, 4 Wash. 311, 30 Pac. 144; *Seattle etc. R. R. Co. v. Gilchrist*, 4 Wash. 509, 30 Pac. 735. That it is otherwise in Colorado, see Colorado

tion of necessity for taking the property for municipal purposes is not for the jury to determine, but is wholly within the province of the municipal authorities.⁴² The cause is heard upon the petition, no answer or reply thereto being necessary. The statute provides, however, for the filing of a cross-petition by any person interested in the property sought to be taken who has not been made a party to the action.⁴³ In some jurisdictions, objections to the condemnation may be interposed by any appropriate pleading.⁴⁴ The landowner is entitled to notice of the application to be made to the court to appropriate his land to public use, before judgment appropriating it can be entered. And after such notice he has the right to contest the appropriation of his land to the petitioner's use.⁴⁵

§ 6815. Joinder of proceedings.—Under the California statute,^{45a} a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company and a proceeding to acquire a right of way over lands which the defendant owns in fee may be united.⁴⁶

§ 6816. Viewing premises.—In the trial of a proceeding for the appropriation of lands, it is within the discretion of the trial court to permit the jury to view the premises.⁴⁷ In some jurisdictions, it is by statute made the duty of the jury to view the premises, in which case the court has no discretion in the matter.⁴⁸

§ 6817. Conclusiveness of judgment.—Independent of statutory provisions, a judgment of a court of competent jurisdiction in condemnation proceedings is as conclusive upon the parties

Cent. R. R. Co. v. Allen, 13 Colo. 229, 22 Pac. 605.

⁴² Warner v. Town of Gunnison, 2 Colo. App. 430, 31 Pac. 238.

⁴³ Denver etc. R. R. Co. v. Griffith, 17 Colo. 598, 31 Pac. 171.

⁴⁴ St. Joseph etc. R. R. Co. v. Hannibal etc. R. R. Co., 94 Mo. 535, 6 S. W. 691; Matter of Lockport etc. R. R. Co., 77 N. Y. 557; Tracy v. Elizabethtown etc. R. R. Co., 80 Ky. 264.

⁴⁵ Baltimore etc. R. R. Co. v. Pittsburgh etc. R. R. Co., 17 W. Va. 812. See Rockwell v. Nearing, 35 N. Y.

306; Langford v. Ramsey County Commrs., 16 Minn. 376; Rutherford's Case, 72 Pa. St. 82, 13 Am. Rep. 655.

^{45a} Code Civ. Proc., § 1244.

⁴⁶ California etc. R. R. Co. v. Southern Pacific R. R. Co., 67 Cal. 59, 7 Pac. 123.

⁴⁷ Bellingham Bay etc. R. R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144; Coughlen v. Chicago etc. R. R. Co., 36 Kan. 422, 13 Pac. 813.

⁴⁸ Kankakee etc. R. R. Co. v. Straut, 102 Ill. 666; Charleton etc. Bridge Co. v. Comstock, 36 W. Va. 263, 15 S. E. 69.

thereto as any other judgment.⁴⁹ The court having jurisdiction of the subject-matter and of the parties, the judgment is conclusive against collateral attack, although it may be erroneous on its merits or irregular in its form.⁵⁰

§ 6818. **Costs.**—The rule governing the allowance and taxation of costs in civil actions must control in proceedings to condemn land.⁵¹ Plaintiff cannot be compelled to pay defendant's attorneys' fees.⁵²

§ 6819. **Parties plaintiff—Damages.**—One who owns an equitable title to real property, and is in possession, may sue for permanent injury.⁵³ The right may be lost by a delay, or be barred by limitations, running from the first occupancy of the street for railroad purposes.⁵⁴

FORMS—EMINENT DOMAIN.

§ 6820. *Lis pendens*—Condemnation of land.

Form No. 1824.

[TITLE.]

Notice is hereby given, that an action has been commenced in the superior court of the [city and] county of . . . , state of California, by the above-named plaintiff against the above-named defendants to condemn the premises hereinafter described for the purpose of [describe the public use].

The premises affected by this action are situated in the county of . . . , state of California, and are bounded and described as follows, to-wit: [Describe lands accurately, as in the complaint, giving the names of owners and occupants.]

Dated this . . . day of . . . , 19..

⁴⁹ Baltimore etc. R. R. Co. v. Pittsburg etc. R. R. Co., 17 W. Va. 812; Muhle v. New York etc. R. R. Co., 86 Tex. 459, 25 S. W. 607; Atchison etc. R. R. Co. v. Forney, 35 Neb. 607, 37 Am. St. Rep. 450, 53 N. W. 585.

⁵⁰ Burke v. City of Kansas, 118 Mo. 309, 24 S. W. 48.

⁵¹ McCready v. Rio Grande West-

ern Ry. Co., 30 Utah, 1, 83 Pac. 331.

⁵² Schneider v. Schneider, 36 Colo. 518, 86 Pac. 347.

⁵³ Foster Lumber Co. v. Arkansas Valley etc. Ry. Co., 20 Okla. 583, 95 Pac. 224, 100 Pac. 1110.

⁵⁴ Denver etc. Ry. Co. v. Hannegan, 43 Colo. 122, 127 Am. St. Rep. 100, 95 Pac. 343, 16 L. R. A. (N. S.) 874.

§ 6821. **Summons—Eminent Domain.**

Form No. 1825.

[TITLE.]

The People of the State of California send greeting to . . .

The above-entitled action is brought by the plaintiff to condemn a right of way through that tract of land situated in the [city and] county of . . . , state of California, and bounded and described as follows, to-wit: [Describe whole property.] Said right of way consists of a strip of land for a double track of the plaintiff's road between [describe the strip]. Reference is made to the complaint herein for a description of the respective parcels of said tract of land.

And you, and each of you, are hereby notified to appear and show cause why the property described should not be condemned as prayed for in the complaint within ten days after the service on you of this summons, if served within this county; or within thirty days, if served elsewhere.

And you are hereby notified that unless you appear and answer as above required the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or will apply to the court for any other relief demanded in the complaint.

Given under my hand, etc.

§ 6822. **Complaint for condemnation of land.**

Form No. 1826.

[TITLE.]

For cause of action plaintiff complains and alleges:

I. That plaintiff is a corporation, duly incorporated, organized and existing under the laws of the state of California, and that the name of plaintiff is . . . Company.

II. That plaintiff is incorporated for the purpose, among other things, of constructing, owning, maintaining [state purpose, and, if a railroad, its general direction and terminal points]; that said railroad has been definitely located by plaintiff over and through the parcel of land hereinafter described; and that said land is necessary for the right of way of said road.

III. [Allege with more particularity the location of the road]; and that a map thereof so far as the same is involved in this proceeding, is hereunto annexed, marked "Exhibit A," and by this reference made a part hereof.

IV. That the following is a description of the land so as aforesaid required for the right of way of said railroad of plaintiff, viz.: [Description.] That said land is sought to be taken in this proceeding; and that the same does not include the whole, but is only a part of, an entire tract.

V. That defendants claim to own the tract of land hereinbefore particularly described, and also the larger tracts of which it is a part, and are all the owners and claimants thereof known to plaintiff.

VI. That the true names of the defendants, John Doe, Richard Roe, [etc.], are unknown to plaintiff, and are therefore herein designated by fictitious names; and plaintiff prays that when their true names are discovered they may be herein inserted by appropriate amendments to this complaint.

VII. That none of the property hereinbefore described has heretofore been appropriated to any public use; and that the said railroad of plaintiff has been located in the manner which will be most compatible with the greatest public good and the least private injury.

Wherefore, plaintiff prays that the court will ascertain and assess:

1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein.

2. The damages which will accrue to the portion not sought to be condemned of the larger parcel of land of which the land hereinbefore particularly described forms a part, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.

3. How much the portion not sought to be condemned, and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff, and if the benefit shall be equal to the damages assessed under the last preceding paragraph of this prayer, that the owner of said parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former may be deducted from the latter, and the remainder be the only damages allowed in addition to the value.

4. The cost of good and sufficient fences along the line of the railroad of plaintiff, and the cost of cattle-guards where fences may cross the line of said railroad.

5. That plaintiff have judgment against defendants condemning the premises hereinbefore particularly described to public use for the purposes hereinbefore set forth, as provided by law, and thereafter, upon compliance with the requirements of said judgment and the provisions of title VII of part III of the Code of Civil Procedure in that behalf contained, a final order of condemnation of said premises be made and entered herein; and for such other and further relief as may be meet in the premises.

[VERIFICATION.]

§ 6823. Outline of judgment in condemnation.

Form No. 1827.

[TITLE OF COURT AND CAUSE.]

This cause having come on for trial on the . . . day of . . . , 19.., before Hon. . . . , superior judge, and the issues therein arising upon the complaint of plaintiff and the answers of [name defendants answering] having been duly tried before the court and a jury, and the said jury having returned their verdict therein, which verdict is in words and figures as follows [recite verdict], and the court having found and determined that the use to which the parcels of land hereinafter described are to be applied is a public use authorized by law, and that the taking of said lands is necessary to such use.

Now, therefore, on motion of . . . , Esq., attorney for the plaintiff,

It is ordered, adjudged and decreed that plaintiff take and acquire and have for its use [or in fee, or as easement, as case may be, and describe public use according to the facts] the pieces or parcels of land hereinafter described, and that the plaintiff pay as compensation, to the persons entitled thereto, the amounts ascertained by said verdict as follows, to-wit:—

To . . . , owner in fee of [describe parcel], the sum of . . . dollars.

To . . . , tenant in possession of said last described premises, the sum of . . . dollars.

Done this . . . day of . . . , 19..

. . . , Judge.

§ 6824. Final order of condemnation.

Form No. 1828.

[TITLE.]

It appearing to the court [may state showing made, whether by vouchers, affidavit, or admission of attorneys for owners] that

the plaintiff has paid the sums required to be paid to the defendants, and all of them, in this action, by the judgment herein:

It is ordered and adjudged, that the parcels of land hereinafter described be and they are hereby condemned for the following uses and purposes: [Name same.]

The parcels of land hereby condemned are particularly described as follows: [Describe as in deed; if easement only is taken, describe easement.]

Done this . . . day of . . . , 19..

A. B., Judge of said court.

CHAPTER CLIII.

FRAUD AND MISTAKE.

§ 6825. **Defined.**—Fraud, in its civil sense, strikes at the foundation of the contract, by taking away the freedom of consent of the contracting parties.¹ A consent which is not free is nevertheless not absolutely void, but may be rescinded by the parties.² Consent to the contract is deemed to have been obtained through fraud only when it would not have been given had such cause not existed.³ Misrepresentations or misstatements amount to fraud when willful or designed.⁴ They must be of existing facts or affirmation of matter in future as facts,⁵ and they must be made in regard to material facts.⁶ Pointing out the wrong property, though an honest mistake of a real estate agent, may constitute fraud.⁷

§ 6826. **Constructive fraud.**—Constructive fraud consists: 1. In any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or, 2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.⁸ The facts constituting fraud must be averred in cases of constructive as well as actual fraud.⁹

§ 6827. **Actual fraud.**—The essential parts to actual fraud are, the making of the representations, that they are false, that defendant knew them to be false, that plaintiff relied on them, and was

¹ Cal. Civ. Code, § 1565.

² Cal. Civ. Code, § 1566.

³ Cal. Civ. Code, § 1568; *Loaiza v. Superior Court*, 85 Cal. 11, 20 Am. St. Rep. 197, 24 Pac. 707, 9 L. R. A. 376; *Elliott v. Southern Pacific Co.*, 145 Cal. 441, 79 Pac. 420, 68 L. R. A. 393.

⁴ *Colton v. Stanford*, 82 Cal. 351, 16 Am. St. Rep. 137, 23 Pac. 16.

⁵ *Lawrence v. Gayetty*, 78 Cal. 126, 12 Am. St. Rep. 29, 20 Pac. 382.

⁶ *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954; *Stockton Combined Harvester etc. Works v. Glens Falls Ins. Co.*, 98 Cal. 557, 33 Pac. 633.

⁷ *Dunham v. Smith*, 15 Okla. 283, 81 Pac. 427.

⁸ Cal. Civ. Code, § 1573.

⁹ *Feeney v. Howard*, 79 Cal. 529, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; *Bickle v. Irvine*, 9 Mont. 251, 23 Pac. 244.

damaged thereby.¹⁰ Actual fraud consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: 1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; 2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true; 3. The suppression of that which is true, by one having knowledge or belief of the fact; 4. A promise made without any intention of performing it; or 5. Any other act fitted to deceive.¹¹ It is actual fraud for a vendor to state as true that which he does not know to be true, intending that the purchaser should act upon it, and to enter into the contract, knowing that the purchaser did so in reliance upon his statements, he not having other means of knowledge.¹² Actual fraud is always a question of fact.¹³

Where a bill charges actual and intentional fraud, and prays for relief on that ground, the complainant cannot, under the prayer for general relief, rely on circumstances which may amount to a case for relief, under a distinct head of equity, although those circumstances substantially appear in the bill, but are charged in aid of the charge of actual fraud.¹⁴ This rule is applied to a purchase from a widow by her stepson. If a bill charges fraud as the ground of relief, fraud must be proved. The proof of other facts, though such as would be sufficient under some circumstances to constitute a claim for relief under another head of equity, will not prevent the bill from being dismissed.¹⁵ An agent can never have authority, either actual or ostensible, to do an act which is, and is known or suspected by the person with whom he deals to be, a fraud upon the principal.¹⁶ An apparent consent (to a contract) is not real or free when obtained through duress, menace, fraud, undue influence, or mistake.¹⁷ Consent is deemed to have been obtained through one of the causes mentioned in the code section only when it would not have been given had such cause not existed.¹⁸

10 David v. Moore, 46 Or. 148, 79 Pac. 415.

11 Cal. Civ. Code, § 1572; Newell v. Long, 14 Okla. 185, 78 Pac. 104.

12 Gropengiesser v. Lake, 103 Cal. 37, 36 Pac. 1036.

13 Cal. Civ. Code, § 1574.

14 Eyre v. Potter, 15 How. 42, 14 L. Ed. 592.

15 Fisher v. Boody, 1 Curtis, 206, Fed. Cas. No. 4814.

16 Cal. Civ. Code, § 2306.

17 Cal. Civ. Code, § 1567.

18 Cal. Civ. Code, § 1568.

§ 6828. **Assignment.**—A cause of action for damages for procuring a sale of goods by false representations is assignable; and the assignee may sue thereon without joining the assignor.¹⁹ As a general rule, a mere right to complain of fraud is not assignable.²⁰ But this rule applies only to a case where the assignment does not carry anything which has itself a legal existence and value independent of the right to sue for a fraud.²¹

§ 6829. **Relief—Means of knowledge.**—In an action for fraudulent misrepresentations, it appears that the defendant had information and knowledge of facts which in the exercise of common sense and ordinary prudence were sufficient to put him on inquiry and lead him to a knowledge of the truth, he will be liable the same as if he had actual knowledge. In such case he had not an honest belief in the truth of the false statement.²² If a vendee is ignorant as to the amount of water necessary for irrigation, and so informs the vendor, he may rely upon his representations.²³ A purchaser may rely upon the statements of officers of a corporation made in reference to the financial condition of the corporation, as it is information difficult to ascertain by others than the officers.²⁴ One may freely rely upon the representations of the manufacturer in reference to complicated machinery.²⁵

§ 6830. **Indentures of apprenticeship** may be released by the court, as to the master, upon his quitting his trade or business or removing out of the state.²⁶

§ 6831. **Instruments made with intent, etc.**—Every instrument, other than a will, affecting an estate in real property, including a charge upon real property, or upon its rents and profits, made with intent to defraud prior or subsequent purchasers

¹⁹ Johnston v. Bennett, 5 Abb. Pr. (N. S.) 331; Allen v. Brown, 51 Barb. 86.

²⁰ Cross v. Sacramento Sav. Bank, 66 Cal. 462, 6 Pac. 94; Whitney v. Kelley, 94 Cal. 146, 28 Am. St. Rep. 106, 29 Pac. 624, 15 L. R. A. 813.

²¹ Emmons v. Barton, 109 Cal. 662, 42 Pac. 303.

²² Morehouse v. Yeager, 41 N. Y. Super. Ct. 135. See Bullitt v. Far-
rar, 42 Minn. 8, 18 Am. St. Rep. 485,

43 N. W. 566, 6 L. R. A. 149; Borders v. Kattleman, 142 Ill. 96, 31 N. E. 19. As to duty of buyer to make inquiry if he suspects the truth of the seller's representations, see Burr v. Willson, 22 Min. 206.

²³ Watson v. Molden, 10 Idaho, 570, 79 Pac. 503.

²⁴ Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811.

²⁵ Mulholland v. Washington Match Co., 35 Wash. 315, 77 Pac. 497.

²⁶ Cal. Civ. Code, § 276.

thereof, or incumbrancers thereon, is void as against every purchaser or incumbrancer, for value, of the same property, or the rents and profits thereof;²⁷ as where conveyance is made to a son upon his promise to pay the parent a certain amount each month, which he had no intention of doing and fails to do,²⁸ but is not void against a purchaser or incumbrancer having notice, unless the fraud is mutual.²⁹

§ 6832. **Involuntary trust resulting from fraud.**—One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.³⁰

§ 6833. **Fraudulent intent.**—A fraudulent intent should be averred in pleading a charge of fraud,³¹ and the facts relied upon as constituting the fraud must be pleaded.³² A party seeking relief from the payment of purchase money, on the ground of fraud, must distinctly allege it in the bill.³³ A party is not bound to communicate to the other all the facts within his knowledge affecting the transaction,^{33a} and what is said must be relied upon by complainant.³⁴

The mere characterization of an act in a pleading as done "with intent to defraud the plaintiff" does not charge fraud.³⁵ In all cases arising under section 1227 of the Civil Code (relating to unlawful transfers), except as provided in section 3440 thereof (which declares that certain transfers are presumed fraudulent), the question of fraudulent intent is one of fact, and not of law. A transfer or charge cannot be adjudged fraudulent solely for want of a valuable consideration, except where it is made or given voluntarily, or without a valuable consideration, by one who is

27 Cal. Civ. Code, § 1227.

28 *Becker v. Schwerdtle*, 141 Cal. 386, 74 Pac. 1029.

29 Cal. Civ. Code, § 1228.

30 Cal. Civ. Code, § 2224. See *McDaniels v. Pattison*, 98 Cal. 93, 32 Pac. 805; *Taylor v. Kelly*, 103 Cal. 183, 37 Pac. 216.

31 See *Moss v. Riddle*, 5 Cranch, 351, 3 L. Ed. 123. Compare *Fenwick v. Grimes*, 5 Cranch C. C. 439, Fed. Cas. No. 4733.

32 See *McClintick v. Johnston*, 1 McLean, 414, Fed. Cas. No. 8700; *Lathrop v. Stewart*, 6 McLean, 630, Fed. Cas. No. 8112.

33 *Noonan v. Lee*, 2 Black, 499, 17 L. Ed. 278.

33a *Ferguson etc. Co. v. Grear*, 76 Kan. 164, 90 Pac. 770.

34 *Youle v. Fosha*, 76 Kan. 20, 90 Pac. 1090.

35 *Gill v. Manhattan Life Ins. Co.* (Ariz.), 95 Pac. 89.

insolvent or contemplating insolvency, when such transfer or incumbrance is void as to existing creditors. A mortgage knowingly given for a sum greater than is due, and not in good faith, as a pretended security for future advances, is fraudulent in law as to the creditors of the mortgagor.³⁶

§ 6834. **Fraudulent representations.**—Monthly remittance by defendant of sums as dividends far in excess of actual dividends is a fraudulent representation to a prospective purchaser of more stock.³⁷ Where a complaint alleged that the plaintiff was the keeper of a livery-stable, and as such it was his business to keep horses for hire, etc.; that he kept in his stable two valuable horses of his own, etc.; that the defendant, knowing these facts, brought to the plaintiff a horse which had the distemper, representing that the horse had recovered and could not communicate the disease; that the plaintiff being ignorant of the condition of the horse, received him into his stable, relying on the defendant's representations; that the defendant knew that the disease was then in the contagious stage, and that the plaintiff's two horses took the disease,—it was held that the complaint was not bad for not alleging that the injury occurred without fault or negligence on the part of the plaintiff, or that the plaintiff did not in his business receive sick and diseased horses for keeping.³⁸

§ 6835. **False representations.**—The essential allegations in an action to recover damages for false and fraudulent representations are—1. That they were false; 2. That defendant knew them to be false; 3. That he made them with intent to defraud the plaintiff. These facts should be clearly stated.³⁹ It must also be alleged that the plaintiff was misled by the false representations of the defendant.^{39a} In an action on the case for fraud in the sale of a lot of land, a declaration sufficiently alleges the fraud which states that the defendant induced the plaintiff to purchase by fraudulently misrepresenting, in the course of a conversation between the plaintiff and the defendant in regard to the sale of the land, "that there were three thousand spruce logs on the premises (meaning

36 Cal. Civ. Code, § 3442. See, also, *Tulley v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102.

37 *Gilluly v. Hosford*, 45 Wash. 594, 88 Pac. 1027.

38 *Fultz v. Wycoff*, 25 Ind. 321.

39 *Sharp v. Mayor of New York*, 25 How. Pr. 389; *Addington v. Allen*, 11 Wend. 374; reversing 7 Wend. 9; *Wells v. Jewett*, 11 How. Pr. 242.

39a *Estep v. Armstrong*, 69 Cal. 536, 11 Pac. 132. See *Clement v.*

that there were spruce trees growing thereon that would cut and make three thousand spruce logs of the usual and customary size and quality), which the plaintiff believed, and bought the premises; and that the representations were false, and known to be so by the defendant.”⁴⁰ Where a complaint averred a fraudulent agreement, and alleged that the representations to the plaintiffs, and the purchase made of the plaintiffs on such representations, were made in pursuance of such fraudulent agreement, and were a device and contrivance, the complaint was held sufficient after verdict.⁴¹ In a suit by a vendee against a vendor, in which fraud is relied upon as the ground of relief, it must appear from the complaint, among other things, that the vendor knew that the representations relied upon were untrue, and that they were made with the intent to defraud the plaintiff.⁴² False representations by a vendor as to its title, to be actionable, must have been made with actual knowledge of the falsity, or under circumstances implying such knowledge.⁴³ In an action for false pretenses, it need not be averred or proved that the party knew at the time of making them that they were untrue.⁴⁴

§ 6836. **Opinion or fact.**—A representation that one has prospected certain land, and that it will yield a certain amount of gold from the grass-roots down, is an expression of opinion, and not a representation of fact.⁴⁵ The leading California case on this subject is *Rendell v. Scott*, in which the court states: “It was certainly matter of opinion when the plaintiff stated that the land was the best ranch in Ione valley, and was very rich and productive, and would produce fifty bushels of wheat to the acre; that a portion was good alfalfa land, and that another portion was rich in mineral deposits, and the other matters alleged may well be classed under the head of matters of opinion rather than a false representation of facts. There is no averment which excludes the idea of personal inspection by the purchaser. In

Boone, 5 Ill. App. 109; *Hexter v. Bast*, 125 Pa. St. 52, 11 Am. St. Rep. 874, 17 Atl. 252.

⁴⁰ *Whitton v. Goddard*, 36 Vt. 730.

⁴¹ *Ballard v. Lockwood*, 1 Daly, 158.

⁴² *Rolfes v. Russel*, 5 Or. 400; *Martin v. Eagle Creek Dev. Co.*, 41 Or. 448, 69 Pac. 216; *Dunning v.*

Cresson, 6 Or. 241; *Britt v. Marks*, 20 Or. 223, 25 Pac. 636.

⁴³ *Curtley v. Security Sav. Soc.*, 46 Wash. 50, 89 Pac. 180.

⁴⁴ *Johnson v. Gulick*, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883.

⁴⁵ *Martin v. Eagle Creek Dev. Co.*, 41 Or. 448, 69 Pac. 216; *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260.

such case the purchaser should exercise his own judgment, and is not entitled to relief in equity." ⁴⁶ A representation of a certain value, made by one owning the land for fifteen years, when made in such a manner that a purchaser may reasonably rely on it, is a representation of fact. ⁴⁷ It is different where the purchaser examines the land. ⁴⁸

In other states, representations of value are considered as mere matters of opinion, especially if no attempt is made to prevent the vendee from examining the property. The vendor is not liable to an action merely because it turns out that he was mistaken. ⁴⁹ Such statements are looked upon merely as representations in regard to value, uttered for the purpose of enhancing the price, and any purchaser who relies upon them is considered as too careless of his own interests to be entitled to relief. ⁵⁰

A false statement as to the value of land, or that the fences are good, made to induce an exchange of lands, is not actionable as a false representation, but is an opinion. ⁵¹ A statement of opinion known to be false, and made with intent to deceive, may be actionable. ⁵² An opinion may be rendered with the greatest degree of positiveness and not be an assertion of untruth; ⁵³ but a party intending simply to state his belief upon information should state it in precise form so as to apprise the other party of the true grounds, as one is held to make good his statements in the form he makes them. ⁵⁴

§ 6837. Representation as to value.—The mere representation by the vendor that the property sold was worth a sum largely in excess of its actual value will not warrant an annulment, especially if the vendee has an opportunity to make an estimate of its value. ⁵⁵ But it is different if the vendor represents himself to have owned

⁴⁶ *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; quoted in *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, at p. 6, 22 Pac. 515, 6 L. R. A. 219; *Lee v. McClelland*, 120 Cal. 148, 52 Pac. 300; *Taylor v. Ford*, 131 Cal. 445, 63 Pac. 770.

⁴⁷ *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018.

⁴⁸ *Van Horn v. O'Connor*, 42 Wash. 513, 85 Pac. 260.

⁴⁹ *Long v. Kendall*, 17 Okla. 70, 87 Pac. 670.

⁵⁰ *Hauk v. Brownell*, 120 Ill. 161, 11 N. E. 416.

⁵¹ *Else v. Freeman*, 72 Kan. 666, 83 Pac. 409.

⁵² *Olston v. Oregon U. P. & Ry. Co.*, 52 Or. 343, 96 Pac. 1095, 20 L. R. A. (N. S.) 915.

⁵³ *In re Estate of Johnson*, 134 Cal. 662, 66 Pac. 847.

⁵⁴ *Muller v. Palmer*, 144 Cal. 305, 77 Pac. 954.

⁵⁵ *Blumenthal v. Greenberg*, 130 Cal. 384, 62 Pac. 599.

the land for many years, and is well informed as to its value, which he then states in an excessive amount, for the reason that he deliberately pledges his faith to the truth of the statement.⁵⁶

§ 6838. **Fraudulent representations of value.**—In an action for fraudulent representations of the value of stock, although the complaint does not allege in terms that the defendant's representations were read by or came to the knowledge of the plaintiff, yet, if it is alleged that she was induced by these representations to purchase the stock of the company, and in exchange for them to convey lands, it is sufficient.⁵⁷ The representations of officers of the company may not bind the company for fraud.⁵⁸ If any fraud is practiced upon a stockholder which induces him to transfer his shares to the company for less than they are worth, he may be relieved in a court of equity.⁵⁹ It is not essential that the representation should be addressed directly to the plaintiff; but he must have come to the knowledge of it before his purchase.⁶⁰

§ 6839. **False recommendation.**—A false recommendation of the credit or property of a third person, with knowledge that it is untrue, and with intent to gain credit for such third person, is a fraud for which the party giving it may be held liable.⁶¹ But if the representation is honestly made, the fact that it was not true does not constitute it a fraud.⁶² Thus a mistaken opinion of the value of property, if honestly entertained, and stated merely as an opinion, unaccompanied by any statement untrue in fact, is not fraudulent.⁶³ But making statements without knowledge, which induced the seller to sell, and which are false in material points, are fraudulent.⁶⁴ In order to subject a defendant to damages for false recommendations as to the credit of a third person, the representation must not only be false but fraudulent, with an intent to deceive. And where a complaint or petition does not allege

⁵⁶ *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018.

⁵⁷ *Newbery v. Garland*, 31 Barb. 121. Compare *Mabey v. Adams*, 3 Bosw. 346.

⁵⁸ *Irby v. Tilsley*, 41 Wash. 211, 83 Pac. 97.

⁵⁹ *Hager v. Thompson*, 1 Black, 80, 17 L. Ed. 41.

⁶⁰ *Cazeaux v. Mali*, 25 Barb. 578.

⁶¹ *Russell v. Clark's Exrs.*, 7 Cranch, 69, 3 L. Ed. 271.

⁶² *Russell v. Clark's Exrs.*, 7 Cranch, 69, 3 L. Ed. 271.

⁶³ *Speiglemyer v. Crawford*, 6 Paige, 254; *Fisher v. Boody*, 1 Curtis, 206, Fed. Cas. No. 4814; *Banta v. Savage*, 12 Nev. 151.

⁶⁴ *Warner v. Daniels*, 1 Woodb. & M. 107, Fed. Cas. No. 17181; *Mason v. Crosby*, 1 Woodb. & M. 353, Fed. Cas. No. 9234; *Smith v. Babcock*, 2 Woodb. & M. 246, Fed. Cas. No. 13009.

such intent to deceive, and contains only a general allegation of fraud, it fails to state a cause of action for deceit.⁶⁵

§ 6840. Belief of plaintiff.—Plaintiff must show not only fraudulent representations, but also that they were relied on.⁶⁶ It is a question of fact whether plaintiff relied upon defendant's representations or not.⁶⁷ If plaintiff has knowledge, or reason and opportunity, to investigate, he has no recourse.⁶⁸ A complaint alleging reliance upon the good faith and representations of his agents when he made and delivered the deed to defendant, who was a mere tool of plaintiff's agents, who themselves were the actual purchasers, sufficiently avers belief in the representations made by such agents.⁶⁹

§ 6841. Fraudulent concealment is the intentional concealment of some fact known to the defendant which it is material for the plaintiff to know to prevent being defrauded.⁷⁰ The concealment of a fact which one is bound to disclose is the equivalent of an indirect representation that such fact does not exist, and differs from a direct false statement only in the mode by which it is made.⁷¹

§ 6842. Knowledge of plaintiff.—Although the fact that the complainant had means of ascertaining, and did ascertain, the facts will ordinarily defeat a suit to rescind a contract on the ground of mistake or fraud,⁷² it will not prevent a recovery if actual fraud is shown to have been practiced upon him to induce him to make the contract,⁷³ or where the parties occupy the relation of trust or confidence.⁷⁴ Fraud vitiates all contracts

⁶⁵ *Redpath v. Lawrence*, 42 Mo. App. 101. See *Reed v. Bott*, 100 Mo. 62, 12 S. W. 347, 14 S. W. 1089.

⁶⁶ *Hutchason v. Spinks*, 3 Cal. App. 291, 85 Pac. 132; *David v. Moore*, 46 Or. 148, 79 Pac. 415.

⁶⁷ *Kabat v. Moore*, 48 Or. 191, 85 Pac. 506.

⁶⁸ *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299; *Martin v. Eagle Creek Dev. Co.*, 41 Or. 448, 69 Pac. 216.

⁶⁹ *Mabry v. Randolph*, 7 Cal. App. 421, 94 Pac. 403.

⁷⁰ *Page v. Parker*, 43 N. H. 363, 80 Am. Dec. 172.

⁷¹ *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 955.

⁷² *Grindrod v. Anglo-Amer. Bond Co.*, 34 Mont. 169, 85 Pac. 891.

⁷³ 1 Story Eq. Jur. 192, 222; *Mofat v. Winslow*, 7 Paige, 124; *Colt v. Woolaston*, 2 P. Wms. 154; *Blain v. Agar*, 2 Sim. 289; *Bond v. Hopkins*, 1 Sch. & Lef. 429; *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17181; *Mason v. Crosby*, 1 Woodb. & M. 342, 352, Fed. Cas. No. 9234; *Tuthill v. Babcock*, 2 Woodb. & M. 298, Fed. Cas. No. 14275.

⁷⁴ *Johnson v. Savage*, 50 Or. 294, 91 Pac. 1082.

tainted by it, and may be set up whether a warranty was given or not.⁷⁵

§ 6843. Mistake of fact.—A mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in—1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing which has not existed.⁷⁶ Mistake of foreign laws is a mistake of fact.⁷⁷ Where a bank has contracted with the maker to advance money to pay a note, unknown to the payee, the bank may rescind the contract at any time before actual payment is made, on the ground that its consent to the contract was given by mistake.⁷⁸

§ 6844. Damage from fraud.—In order to entitle a party to rescind a contract for fraud, he must show that some damage has resulted to him therefrom. Fraud is, however, the essential thing, and while it must be coupled with loss, injury, or damage, the precise amount of damage is of secondary importance.⁷⁹ In an action to rescind a partnership contract for fraudulent representations as to previous profits of the business, it is necessary to allege that the plaintiff was induced thereby to pay more for the goods than he would otherwise have done, or that the business was not profitable after the purchase, or to show that the plaintiff was in some way injured by the representations.⁸⁰

§ 6845. Fraud, when consummated.—Any material misrepresentations of a material fact as to which one party places a known trust and confidence in the other, and by which the confiding party is actually misled to his injury, will induce a court of chancery to set aside a conveyance.⁸¹ Fraud in the use of a written instru-

⁷⁵ *Reutgen v. Knowrs*, 1 Wash. C. 170, Fed. Cas. No. 11710; *Smart v. Wolff*, 3 T. R. 323; *Willson v. Foree*, 6 Johns. 110, 5 Am. Dec. 195; *Gates v. Caldwell*, 7 Mass. 68; *Smith v. Babcock*, 2 Woodb. & M 246, Fed. Cas. No. 13009; *Tyler v. Black*, 13 How. 230, 14 L. Ed. 124.

⁷⁶ Cal. Civ. Code, § 1577.

⁷⁷ Cal. Civ. Code, § 1579.

⁷⁸ *Steinhart v. National Bank etc. Mills*, 94 Cal. 362, 28 Am. St. Rep. 132, 29 Pac. 717.

⁷⁹ *Wainscott v. Occidental etc. Loan Assoc.*, 93 Cal. 253, 33 Pac. 88.

⁸⁰ *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868.

⁸¹ *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42.

ment is as much ground for the interposition of equity as fraud in its creation.⁸² But the display of a copy of a map made by another, without any representations, for the purpose of inducing one to purchase a mining claim, is not fraud, though the map is not correct.⁸³ The fraudulent intent of a party to procure goods without payment is consummated when the possession of the goods is obtained without payment on delivery, or on call, according to the terms of the sale.⁸⁴

§ 6846. **Fraudulent deed.**—C. fraudulently obtained a deed of D., conveying land in Michigan, and had said deed recorded in said state; C. then granted said lands to third parties. It was held that even under this fraud courts of another state could not undertake to pronounce these recorded deeds nullities. But the parties being before the court, and there being no attempt to prove that the last-mentioned grantees were purchasers for a valuable consideration, the court could compel said grantees to execute to D. a release of all claim acquired through the deed from him, under penalty of attachment for contempt. If said grantees should go beyond the jurisdiction, the court should appoint a special commissioner to make the conveyances in their stead.¹⁵ In an action to set aside as fraudulent a conveyance of land, so much of the complaint as sets out in detail the inceptive steps which culminated in the alleged fraudulent conveyance is not irrelevant or redundant matter.⁸⁶

§ 6847. **Reformation of deed.**—A complaint in equity to have a deed absolute on its face reformed so as to become a deed of trust which avers that the deed does not express the trusts and conditions upon which it was agreed the property should be transferred, but that such conditions were by the defendants fraudulently suppressed, without any statements of what acts of fraud were practiced, does not state facts sufficient to constitute a cause of action.⁸⁷ Where a party brings a bill to have a conveyance which is absolute on its face declared a mortgage to secure

⁸² *Pierce v. Robinson*, 13 Cal. 116.

⁸³ *Connell v. El Paso Gold Min. etc. Co.*, 33 Colo. 30, 78 Pac. 677.

⁸⁴ *Stewart v. Levy*, 36 Cal. 159.

⁸⁵ *Cooley v. Scarlett*, 38 Ill. 316,

⁸⁷ *Am. Dec.* 298.

⁸⁶ *Perkins v. Center*, 35 Cal. 713.

As to sufficient averment of fraud in the procurement of a conveyance from a son to his mother, see *Rhino v. Emery*, 72 Fed. 382, 18 C. C. A. 600. Compare *Soberanes v. Soberanes*, 106 Cal. 1, 39 Pac. 39, 527.

⁸⁷ *Kent v. Snyder*, 30 Cal. 666.

an oral promise to pay a certain sum of money in gold, and to redeem, he cannot redeem except on paying said sum in gold, and this not on the ground of the specific contract act, but because "he who seeks equity must do equity."⁸⁸

§ 6848. **Reformation of contract.**—A complaint seeking to have a written contract reformed, and for judgment thereon when reformed, states but a single cause of action.⁸⁹ Where in reducing an agreement to writing a material clause has been omitted by mistake, a party seeking to avail himself of the actual contract must obtain a reformation of the writing, either by a distinct proceeding to reform it or by specially pleading the mistake in the action in which the contract is sought to be used, and asking its correction as independent relief. Under a pleading which simply states the terms of a contract, the introduction of a written agreement respecting the subject-matter cannot be followed by oral proof of a material clause alleged to have been omitted by mistake from the writing.⁹⁰ In order to have a contract reformed, the pleading should set out what the contract was as the parties made it, and why its terms happened to be left out, or how terms not agreed upon came to be inserted.⁹¹

§ 6849. **Act of agent.**—Fraud committed through an agent is well stated in pleading as that of the principal. If this were otherwise, and it appeared at the trial to be that of an agent, without any participation of his principal, the variance is the subject of amendment, and will be disregarded upon appeal.⁹² Equity will relieve, where falsehood or fraud is practiced, whether it be the principal or the agent.⁹³ Even when the false representations are made to a third person, and by him communicated to the pur-

⁸⁸ *Cowing v. Rogers*, 34 Cal. 648. For the allegation of a complaint seeking to reform a mortgage on the ground of fraud, and for foreclosure as reformed, see *DePeyster v. Hasbrouck*, 11 N. Y. 582. That the facts should be distinctly stated entitling the plaintiff to relief, see *Lamoureux v. Atlantic Ins. Co.*, 3 Duer, 680.

⁸⁹ *Gooding v. M'Alister*, 9 How. Pr. 123. Of the rules of pleading applicable, where a party sued for non-performance of a contract in writing seeks to have it reformed so

as to express the real intentions of the parties, see *Wemple v. Stewart*, 22 Barb. 154.

⁹⁰ *Pierson v. McCahill*, 21 Cal. 122.

⁹¹ *Foster v. Schmeer*, 15 Or. 363, 15 Pac. 626. See *Osborn v. Ketchum*, 25 Or. 352, 35 Pac. 972; *Hyland v. Hyland*, 19 Or. 51, 23 Pac. 811; *Meier v. Kelly*, 20 Or. 86, 25 Pac. 73.

⁹² *Bennett v. Judson*, 21 N. Y. 238.

⁹³ *Mason v. Crosby*, 1 Woodb. & M. 342, Fed. Cas. No. 9234; *Smith v. Babcock*, 2 Woodb. & M. 246, 293, Fed. Cas. No. 13009.

chaser, it is deemed as if made by the seller.⁹⁴ In case of fraudulent representations by a stranger, the relief granted must be on the ground of mistake.⁹⁵ An action *ex contractu* does not lie against one who fraudulently represents himself as the agent of another, and makes a contract in his name. The remedy is an action for deceit.⁹⁶ It is a fraud for an agent to avail himself of his confidential relations to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust even when the agency must be proved only by parol.⁹⁷ In alleging fraud committed by an agent, it is the better practice to state the fact that the defendant acted by an agent.⁹⁸

§ 6850. **Act of legislature—Fraud.**—An act of the legislature is not subject to attack on the ground of fraud.⁹⁹ The court has no jurisdiction of the subject-matter of fraud or mistake connected with legislative or political action.¹⁰⁰ Any attempts to deceive persons intrusted with the high functions of legislation by secret combinations, or to create or bring into operation undue influences of any kind, have all the injurious effects of a direct fraud on the public.¹⁰¹ All persons interested in the passage of an act have an undoubted right, either in person or by counsel, to urge their claims and arguments before legislative committees as well as in courts of justice; but a hired advocate or agent, assuming to act in a different character, is practicing deceit on the legislature.¹⁰²

§ 6851. **Act of attorney.**—If a sale of lands under a power of attorney procured through fraud be set aside as fraudulent and void *ab initio*, the fraudulent vendee is not entitled to a decree against the vendor for restitution of a part of the purchase money paid to the attorney who was a privy to the fraud.¹⁰³

⁹⁴ Crocker v. Lewis, 3 Sumn. 1, Fed. Cas. No. 3399.

⁹⁵ Fisher v. Boody, 1 Curtis, 206, Fed. Cas. No. 4814.

⁹⁶ Noyes v. Loring, 55 Me. 408.

⁹⁷ Lees v. Nuttall, 1 Russ. & M. 53; Carter v. Palmer, 11 Bligh, 397, 418; Jenkins v. Eldridge, 3 Story, 183, Fed. Cas. No. 7266. But see Bartlett v. Pickersgill, 1 Eden, 515, 1 Cox, 15; Leman v. Whitley, 4 Russ. 423.

⁹⁸ See, also, 2 Chit. Pl. 117; 1 Wentw. 345.

⁹⁹ Sherman v. Story, 30 Cal. 266, 89 Am. Dec. 93; Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 354.

¹⁰⁰ County of Riverside v. County of San Bernardino, 134 Cal. 517, 66 Pac. 788.

¹⁰¹ Marshall v. Baltimore etc. R. R. Co., 16 How. 334, 14 L. Ed. 958.

¹⁰² See Miles v. Thorne, 38 Cal. 335, 99 Am. Dec. 384.

¹⁰³ Sanches v. McMahon, 35 Cal. 218.

§ 6852. **By bidding.**—The employment of any person by a seller to bid at a sale by auction, without the knowledge of the buyer, without an intention on the part of such bidder to buy, and on the part of such seller to enforce his bid, is a fraud upon the buyer which entitles him to rescind his purchase.¹⁰⁴

§ 6853. **Consideration.**—Mere inadequacy of consideration, unless extremely gross, does not *per se* prove fraud or mistake.¹⁰⁵ The inserting in the deed of a consideration less than the true consideration is not of itself a fraud if a fair amount was paid.¹⁰⁶ But an entire failure of consideration is often sufficient to rescind a contract in equity, although mere inadequacy of consideration is not.¹⁰⁷ Where a purchaser does not receive the title which the deed purports to convey, and he goes into and retains possession under the deed, and the failure of title goes to the entire consideration paid, the remedy is by a rescission of the contract, alleging a paramount title in another, and offering to redeliver possession and account for the rents and profits.¹⁰⁸ Money received upon false representation of ownership of land may be recovered, with actual damages.¹⁰⁹ A creditor who attacks a sale on the ground of fraud as to him, admits the validity of the sale between the parties thereto, but seeks the benefit of the statute as to himself, and must show fraud.¹¹⁰

§ 6854. **Contract to exempt from liability.**—All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.¹¹¹ This provision applies to contracts given under threat of arrest, etc.¹¹² A contract to exempt a railroad company, as lessor, from damage

¹⁰⁴ Cal. Civ. Code, § 1797.

¹⁰⁵ *Eyre v. Potter*, 15 How. 42, 14 L. Ed. 592; *Wright v. Stanard*, 2 Brock. Marsh. 311, Fed. Cas. No. 18094. This subject is considered in *Vint v. King*, 2 Am. Law Reg. 712, Fed. Cas. No. 16950.

¹⁰⁶ *Ex parte Knowles*, 2 Cranch C. C. 576, Fed. Cas. No. 7895.

¹⁰⁷ *Bolton v. Williams*, 2 Ves. 155; 1 Story's Equity Jurisprudence, 244; 1 Knapp P. C. 73; *Gurtside v. Isherwood*, 1 Brown Ch. Ct. App. 558; P. P. F., Vol. IV—35

Griffith v. Stratley, 1 Cox, 383; *Low v. Burchard*, 8 Ves. 133; *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17181.

¹⁰⁸ *Walker v. Sedgwick*, 8 Cal. 398.

¹⁰⁹ *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321. See Cal. Civ. Code, §§ 1709, 1710.

¹¹⁰ *Thornton v. Hook*, 36 Cal. 223.

¹¹¹ Cal. Civ. Code, § 1668.

¹¹² *Morrill v. Nightingale*, 93 Cal. 452, 27 Am. St. Rep. 207, 28 Pac. 1068.

from fires caused by the railroad is not void as against public policy, as it does not increase the risk by fire to property of the public.¹¹³

§ 6855. **Contract not in writing through fraud.**—Where a contract which is required by law to be in writing is prevented from being put into writing by the fraud of a party thereto, any other party who is by such fraud led to believe that it is in writing, and acts upon such belief to his prejudice, may enforce it against the fraudulent party.¹¹⁴

§ 6856. **Conveyance by corporation.**—If the persons interested in one corporation form a new one, which chooses for its officers the officers of the old corporation, and the persons owning the stock in the old corporation receive in exchange therefor stock of the new, and the trustees then cause the property of the old corporation to be conveyed to the new, the conveyance is a fraud upon the creditors of the old corporation.¹¹⁵

§ 6857. **Damages—Exemplary.**—A recovery cannot be had for a false representation without proof of damage.¹¹⁶ Exemplary damages may be given in an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed.¹¹⁷

§ 6858. **Fraud of partner.**—In case of a debt fraudulently contracted by a partnership firm by one member alone, made with innocent third parties, while all the members will be bound in an action brought on the contract, or to recover the property so fraudulently obtained, yet the liability to an action for the fraud, which is essentially different, and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud or ratified it, or retained its fruits with knowledge of the fraud.¹¹⁸

§ 6859. **Deed in escrow.**—Where a bill in equity is filed to cancel a deed which avers that the grantor deposited the same

¹¹³ *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783, 29 L. R. A. 751.

¹¹⁴ Cal. Civ. Code, § 1623.

¹¹⁵ *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 398.

¹¹⁶ *Morrison v. Lods*, 39 Cal. 381; *Marshall v. Buchanan*, 35 Cal. 264, 95 Am. Dec. 95; *Freeman v. Venner*, 120 Mass. 424.

¹¹⁷ Cal. Civ. Code, § 3294.

¹¹⁸ *Stewart v. Levy*, 36 Cal. 159.

with a third person, to be by him delivered to the grantee upon the order of the grantor or his agent, and that before the agent gave the order the grantor directed the third person not to deliver the deed, but does not aver that the third person intends or threatens to deliver the deed to the grantee, or that he will disobey the instructions of the grantor, the bill does not state facts sufficient to constitute a cause of action.¹¹⁹ If a suit to rescind a deed is brought after a considerable lapse of time, and after the plaintiff has exercised the powers of an owner over the property, so as to change its character or value materially, the bill must state sufficient reasons for the delay; and those reasons must be made out in proof.¹²⁰

§ 6860. **Demand.**—A demand for the price of goods sold is not necessary to maintain an action against a debtor for fraudulently purchasing the same. Payment, though it would satisfy the debt, would not remove the fraud, which is the gravamen of the action.¹²¹

§ 6861. **Equity—Injunction.**—The party who comes into a court of equity to enjoin a sheriff from selling real estate on an execution against the plaintiff's grantor cannot obtain relief if his purchase is tainted with fraud.¹²²

§ 6861a. **Evidence.**—Other acts of fraud are admissible to corroborate the evidence of the fraud for which the suit is brought, whenever the two are shown to have been parts of one scheme or plan.¹²³ The delivery of a deed in blank, by which to obtain money of one not informed of the fact that it is in blank, affords strong evidence of fraud.¹²⁴

§ 6862. **Patent to land.**—Fraud may be shown at law in the procurement of a patent or the execution of a deed.¹²⁵ In an action to set aside a patent for land on the ground that it was

¹¹⁹ *Fitch v. Bunch*, 30 Cal. 208.

¹²⁰ *Fisher v. Boody*, 1 Curtis, 206, Fed. Cas. No. 4814. For a complaint to set aside a deed of a minor, on his coming of age, see *Voorhies v. Voorhies*, 24 Barb. 150.

¹²¹ *Stewart v. Levy*, 36 Cal. 159.

¹²² *San Francisco etc. R. R. Co. v. Bee*, 48 Cal. 398.

¹²³ *Berkey v. Judd*, 22 Minn. 287; *Waters' Patent Heater Co. v. Smith*, 120 Mass. 444; *Eastman v. Premo*, 49 Vt. 355, 24 Am. Rep. 142.

¹²⁴ *Wilson v. South Park Commrs.*, 70 Ill. 46.

¹²⁵ *Cooper v. Roberts*, 6 McLean, 93, Fed. Cas. No. 3201.

procured by false suggestions, fraudulent concealments, and by misrepresentations, the acts of fraud and misrepresentation must be specified in the complaint.¹²⁶ Where a party, in order to bring himself within a class of legislative grantees, must exhibit his muniments of title, fraud may be shown to prove that they have been dishonestly obtained.¹²⁷ When it appears that the relator is the real party in interest, and that the state has no direct interest in the event of the suit, he has a right to the control of the suit, and is responsible for its commencement, conduct, and costs.¹²⁸

§ 6863. **Patent to land—Form of complaint.**—A complaint in the name of the people, at the relation of an individual, to cancel a patent, which merely avers that the relator is seised and possessed of the land, and that his title was derived from the state of California, under and by virtue of the location of a school-warrant, made under and in accordance with the provisions of an act of the legislature, and that said location was duly and properly made, and in all respects according to the provision of said act, does not state facts sufficient to constitute a cause of action. A general averment of the performance of conditions precedent is sufficient in actions on contracts, but in other cases the facts showing the performance must be alleged.¹²⁹ A complaint in equity, filed for the purpose of setting aside a grant on the ground that it was obtained by fraud, must state specifically and definitely the facts constituting the fraud.¹³⁰

§ 6864. **Fraudulent account.**—Where the board of supervisors of a county allowed an account presented for services as tax-collector, and the auditor drew his warrant in favor of E. for the amount, and he assigned it to defendant M., a *bona fide* purchaser without notice, it was held that the county cannot go into equity to cancel the warrant and enjoin its collection as against M., on the ground that the account was false and fraudulent as to some of its items, and was allowed by the board through ignorance of the facts and mistake; that the supervisors were acting within the scope of their authority, and the county

¹²⁶ *Simple v. Hagar*, 27 Cal. 163;
Parley's Park S. M. Co. v. Kerr, 3

Utah, 235, 2 Pac. 790.

¹²⁷ *Seabury v. Field*, 1 McAll. 60,
Fed. Cas. No. 12575.

¹²⁸ *People v. North San Francisco
Homestead etc. Assoc.*, 38 Cal. 564.

¹²⁹ *People v. Jackson*, 24 Cal. 632.

¹³⁰ *Oakland v. Carpentier*, 21 Cal.
642.

cannot visit upon an innocent party the consequence of their negligence.¹³¹

As a general rule, settled accounts will not be opened on mere conflicting evidence, and, if opened, only errors particularly and fully alleged will be considered. Fraud or error must be precisely pleaded, so that issue may be joined and the adversary be prepared.¹³²

§ 6865. Fraudulent note.—When a party has given a promissory note, and the payee assigned the note, without recourse, after maturity, and suit was brought upon the note by the assignee, the maker then filing his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction and that the note be canceled, it was held that the case was a proper one for equitable relief, and the maker had the right to have the note canceled, so as to prevent future litigation.¹³³

§ 6866. Fraudulent sale.—If a debtor makes a sale of his personal property to one of his creditors, with the understanding that out of the proceeds of a sale of the property the creditor shall retain enough to pay his own debt, then pay certain other creditors, and then pay the balance of the proceeds over to the debtor, and this sale is made to prevent other creditors from attaching the property, it is actual fraud, and vitiates the sale as to other creditors.¹³⁴ If a complaint avers that the defendant, by false representation as to the value of mines, induced the plaintiff to purchase the same, and pay a sum of money therefor, and that defendant gave plaintiff a deed therefor, and received the consideration, and also claims general damages exceeding the consideration, and avers an offer to return the deed, it is an action, in common-law parlance, *ex delicto*, and not *ex contractu*, and the averment of an offer to return the deed is not an offer of a rescission of the contract, nor an offer to rescind. If the plaintiff in his complaint claims damages for a fraudulent sale of mines to him, and avers an offer to return the deed given to him,

¹³¹ El Dorado County v. Elstner, 18 Cal. 144.

¹³² Fleischner v. Kubli, 20 Or. 328, 25 Pac. 1086; Hoyt v. Clarkson, 23 Or. 51, 31 Pac. 198.

¹³³ Domingo v. Getman, 9 Cal. 97.

¹³⁴ Menton v. Adams, 49 Cal. 620. As to when the bona fides of a sale can be inquired into, see Quinn v. Smith, 49 Cal. 163. As to change of possession and circumstances of fraud, see Regli v. McClure, 47 Cal. 612.

an amendment striking out the offer to return the deed does not change the issues tendered in the complaint.¹³⁵ Thus, where plaintiff and defendant were partners in the purchase of mining claims, and defendant was the active partner and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value, and plaintiff sold his interest in this claim to defendant for greatly less than its value, it was held that in a suit by plaintiff against defendant, to set aside this sale for fraud, and for an account, etc., an averment that defendant is indebted to plaintiff on an account in a sum greater than that paid by defendant for the mining claim is in effect an offer to place the defendant in *statu quo*.¹³⁶

Circumstances tending to show fraud in reference to the adjournment of a sale previously noticed, under proceedings which had been subsequently abandoned and proceedings commenced anew, are held not to amount to fraud in the sale.¹³⁷ Fraudulent representation or deceit, accompanied by damage, constitutes a good ground of action in respect to a sale of lands,¹³⁸ and a recovery by the rightful owner against the buyer is conclusive against the fraudulent seller.¹³⁹ If an owner stands by and suffers an innocent person to be misled by his silence, it is fraud upon the purchaser.¹⁴⁰ But the mere fact of a wife remaining silent as to her rights is not a circumstance sufficient to affect her with the fraud.¹⁴¹ But a silent partner who did not know nor assume to know as to the truth of a statement of the condition of the firm made by one of his copartners is not liable for fraud effected by such statement.¹⁴²

§ 6867. Sale under warranty.—Under the forms of pleading at common law, the vendee of chattels, sold with a warranty of title, could, on a breach of the warranty, recover damages in *assumpsit*, or he might sue in an action on the case for deceit, if

¹³⁵ Ahrens v. Adler, 33 Cal. 608.

¹³⁶ Watts v. White, 13 Cal. 321.
For complaints to set aside guardian's sale as fraudulent, see Clark v. Underwood, 17 Barb. 202.

¹³⁷ Leet v. McMaster, 51 Barb. 236.

¹³⁸ Crandal v. Bryan, 5 Abb. Pr. 162; Clark v. Baird, 9 N. Y. 183. See Van De Sande v. Hall, 13 How. Pr. 458.

¹³⁹ Barney v. Dewey, 13 Johns. 224, 7 Am. Dec. 372.

¹⁴⁰ The Sarah Ann, 2 Sumn. 206, Fed. Cas. No. 12342; affirmed, New England Ins. Co. v. The Sarah Ann, 13 Pet. 387, 10 L. Ed. 213.

¹⁴¹ Bank of United States v. Lee, 13 Pet. 107, 10 L. Ed. 81.

¹⁴² Chamberlin v. Prior, 2 Keyes, 539.

there had been deceit, as well as a warranty of title; but in either case he must plead specially.¹⁴³

§ 6868. **Title does not pass.**—Where goods are sold upon credit, upon representations that left the impression on the seller that the buyer possessed mining claims which were of themselves an “immense fortune,” and these representations were false, no title to the goods passed to the buyer.¹⁴⁴ One may rely upon the representations of a seller as to his ownership of personal property.¹⁴⁵ The grantee in a deed, delivery of which is secured by fraud, does not pass title which can be conveyed to a *bona fide* purchaser for value.¹⁴⁶

§ 6869. **Sale by wife.**—While property after a sale under a foreclosure was subject to redemption, the wife, by her quitclaim deed, conveyed all her interest in it to S. for an inadequate consideration, and immediately thereafter S. conveyed it to C., who furnished the money which was paid to the wife. It was held that she is not entitled to rescind the contract of sale.¹⁴⁷ The rights of the wife in the homestead cannot be prejudiced by fraudulent acts of the husband, where she did not participate.¹⁴⁸

§ 6870. **Statute of limitations.**—A cause of action on the ground of fraud is barred after three years from the perpetration of the fraud.¹⁴⁹ If the plaintiff wishes in such case to bring himself within the exception of the statute, he must allege the fact of a discovery of a fraud at a period bringing him within the exception.¹⁵⁰ The complaint should also aver that the acts constituting the fraud had been discovered within three years; but if the replication contains this averment, and this issue is tried without objection, the irregularity in the answer of presenting the issue will be disregarded.¹⁵¹ If plaintiff alleges fraud to have been committed more than three years before the commencement of his action, to bring himself within the exception

143 *Miller v. Van Tassel*, 24 Cal. 463.

144 *Bell v. Ellis*, 33 Cal. 620.

145 *Crandall v. Parks*, 152 Cal. 772, 93 Pac. 1018.

146 *Burns v. Kennedy*, 49 Or. 588, 90 Pac. 1102.

147 *Perkins v. Center*, 35 Cal. 713.

148 *Barber v. Babel*, 36 Cal. 11.

149 *Carpentier v. Oakland*, 30 Cal. 444.

150 *Id.* See Cal. Code Civ. Proc., § 338, subd. 4; *Lady Washington etc. Co. v. Wood*, 113 Cal. 482, 45 Pac. 809.

151 *Boyd v. Blankman*, 29 Cal. 20, 87 Am. Dec. 146.

of the statute, he must allege the fact of a discovery at a period bringing him within the exception.¹⁵²

§ 6871. **Jurisdiction.**—Courts of law and equity have concurrent jurisdiction of fraud in many cases;¹⁵³ to enforce a bond canceled by the obligee in consequence of fraud practiced by the obligor.¹⁵⁴ On account of the difficulties in adjusting the rights and equities of the parties at law, a court of law refuses to open the question of fraud, in the consideration or in the transaction out of which the consideration arises, in a suit upon a sealed instrument.¹⁵⁵ Fraud is a well-recognized ground of equitable jurisdiction.¹⁵⁶ In both equity and law, fraud and injury must concur to furnish ground for judicial action.¹⁵⁷ Courts of equity may direct the cancellation of a contract for fraud or mistake, or may reform and enforce the written contract but they cannot alter the actual contract intended by the parties.¹⁵⁸

§ 6872. **Mistake.**—It is not true, as a legal proposition, that a mistake is constructive fraud. An allegation of actual fraud is not sustained by proof of a mistake.¹⁵⁹ Where in a negotiation for the sale of land the vendor points out to the vendee, as the subject of the proposed sale, land belonging to another person, and the vendee accepts a deed of land belonging to the vendor, supposing it to be the land so pointed out, he may recover damages for the misrepresentation, without proof of any fraudulent intent.¹⁶⁰

§ 6873. **Mistake of law.**—A mistake of law constitutes a mistake, within the meaning of the code provisions, only when it

¹⁵² Sublette v. Tinney, 9 Cal. 423; Boyd v. Blankman, 29 Cal. 20, 87 Am. Dec. 146; Carpentier v. City of Oakland, 30 Cal. 444. See Moore v. Moore, 56 Cal. 89; Williams v. Denison, 94 Cal. 540, 29 Pac. 946.

¹⁵³ Swayze v. Burke, 12 Pet. 11, 9 L. Ed. 980; Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11740; Seabury v. Field, 1 McAll. 60, Fed. Cas. No. 12575; McMullin v. Sanders, 79 Va. 356; Stockton v. Anderson, 40 N. J. Eq. 486, 4 Atl. 642.

¹⁵⁴ United States v. Spaulding, 2 Mason, 478, Fed. Cas. No. 16365.

¹⁵⁵ Hartshorn v. Day, 19 How. 211, 15 L. Ed. 605; overruling Day v. New England Car Spring Co., 3 Liv. Law Mag. 44, Fed. Cas. No. 3688.

¹⁵⁶ Atkins v. Dick, 14 Pet. 114, 10 L. Ed. 378.

¹⁵⁷ Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046.

¹⁵⁸ Brooks v. Stolley, 3 McLean, 523, Fed. Cas. No. 1962.

¹⁵⁹ Mercier v. Lewis, 39 Cal. 532; Connell v. El Paso Gold Min. etc. Co., 33 Colo. 30, 78 Pac. 677.

¹⁶⁰ Bird v. Kleiner, 41 Wis. 134.

arises from—1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.¹⁶¹

§ 6874. Misapplication of money.—All persons in interest must be joined in a suit against a party for misapplication of money collected by him.¹⁶² A charge of embezzlement, and praying that defendant be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud.¹⁶³ The facts which constitute the fiduciary capacity, its nature and extent, should be stated in direct and positive terms. It is necessary in such case to charge not only that defendant received the money as agent, but that he converted it in the course of his employment as such. The allegation that the defendant collected the money as agent or attorney in fact is, in substance, that the defendant collected the money as agent, or if not as agent, then as attorney in fact.¹⁶⁴ The embezzlement by an officer of a national bank of a special deposit in such bank is not made punishable by any statute of the United States, and may therefore be punished under a state law. Otherwise, of such embezzlement of the property of the bank.¹⁶⁵

§ 6875. Legal remedy must be exhausted.—To obtain the aid of chancery for relief against a fraudulent judgment, it must be shown that the plaintiff has exhausted all proper diligence to defend the action in which judgment was rendered.¹⁶⁶ Where the complaint contains no averment showing that relief could not have been obtained on motion, it may be demurrable; but if the act appears on the record, and no demurrer be interposed, but defendant goes to trial on the merits, the objection is waived.¹⁶⁷

§ 6876. When action lies.—It is a well-settled principle that mistakes in written instruments may be corrected in a court of equity, and it will not only go back to the original error and

¹⁶¹ Cal. Civ. Code, § 1578.

¹⁶² Harris v. Schultz, 40 Barb.

315.

¹⁶³ Porter v. Hermann, 8 Cal. 623.

¹⁶⁴ Porter v. Hermann, 8 Cal. 623.

¹⁶⁵ State v. Tuller, 34 Conn. 280.

¹⁶⁶ Riddle v. Baker, 13 Cal. 295.

¹⁶⁷ Bibend v. Kreutz, 20 Cal. 109.

reform it, but will administer complete justice by correcting all subsequent mistakes which grow out of and were superinduced by the first.¹⁶⁸ When the fraudulent representations relate to the quantity of the land, it is immaterial whether the sale is in gross or by the acre.¹⁶⁹

An action lies for a false and fraudulent representation whereby another has suffered damage.¹⁷⁰ And the question of fraudulent intent is a question of fact for the jury.¹⁷¹ Such an action cannot be joined with a cause of action on a guaranty of the amount of purchase.¹⁷²

Where money or property is procured upon credit by fraud, an action of debt will lie before the term of credit has expired.¹⁷³ And where money is fraudulently obtained on a promissory note, a suit brought to recover the money, disregarding the note, is not an affirmance of the note.¹⁷⁴ Any false misrepresentation or artifice by a purchaser of goods, if the seller is thereby induced to part with them, which otherwise he would not have done, will invalidate the sale, whether the purchaser is solvent or insolvent. A sale of goods on credit will be avoided where the buyer, knowing himself insolvent, purchases with the intention of not paying for them, although no false representations were made by him.¹⁷⁵

§ 6877. Election of remedy—Rescission or affirmation.—There is no rigid and inexorable rule of estoppel as to the election of remedy in cases of fraud. An election to disaffirm a contract induced by fraud, and an effort to obtain a rescission of it, will not, if resisted, and especially if rendered impossible or difficult or of doubtful advantage by the act of the guilty party, bar an action and judgment for damages based upon affirmance of the contract.¹⁷⁶ One defrauded in a contract of settlement

¹⁶⁸ *Quivey v. Baker*, 37 Cal. 465. See *Humphreys v. Hurtt*, 20 Hun, 398.

¹⁶⁹ *Thomas v. Beebe*, 25 N. Y. 244.

¹⁷⁰ *Marshall v. Buchanan*, 35 Cal. 264, 95 Am. Dec. 95.

¹⁷¹ *Tully v. Harloe*, 35 Cal. 302, 95 Am. Dec. 102. The principles upon which the action is based, and the authorities which support it, collected in *Addington v. Allen*, 11 Wend. 374.

¹⁷² But see *Robinson v. Flint*, 7 Abb. Pr. 393, note.

¹⁷³ *Hill v. Perrott*, 3 Taunt. 274; *Foster v. Stewart*, 3 Mau. & Sel. 191; *Seaver v. Dingley*, 4 Greenl. (Me.) 306; *Willson v. Foree*, 6 Johns. 110, 5 Am. Dec. 195; 1 Com. on Con. 38.

¹⁷⁴ *Gibson v. Stevens*, 3 McLean, 551, Fed. Cas. No. 5401.

¹⁷⁵ *Kloppenstone v. Mulcahy*, 4 Nev. 296.

¹⁷⁶ *Montgomery v. McLaury*, 143 Cal. 83, 76 Pac. 964.

may either rescind and restore what he received, and recover what he parted with, or he may affirm the contract and sue for damages for the fraud, but he cannot have both.¹⁷⁷

In an action for damages for deceit in an exchange of property, the rules of rescission are not applicable, and asking for the cancellation of a note and mortgage given in the trade is not an attempt to rescind the exchange.¹⁷⁸ Continuing to make payments upon such a mortgage is a waiver of the right of rescission.¹⁷⁹ The defrauded one must exercise his election to rescind with reasonable promptness after discovering fraud as to any material matter. He then has notice that he may have been defrauded in all material matters.¹⁸⁰

§ 6878. Relief from fraud.—A party defrauded may rescind and restore within a reasonable time all the value which he has received under the contract, or he may affirm it and sue for damages.¹⁸¹ In actions for relief against fraud, the fraud, and not the discovery, is the substantive cause of action.¹⁸² Relief will not be afforded upon the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue.¹⁸³ And allegations of fraud in a bill, which allegations are subsequently withdrawn, cannot aid the jurisdiction.¹⁸⁴

§ 6879. Return of purchase money.—When a plaintiff is in a condition to rescind a contract, he may recover back in *assumpsit* the money paid on it.¹⁸⁵ Where an action is in disaffirmance of a contract to recover back the price paid, and it appears that the plaintiff has complied up to the time of electing to rescind, tender or offer of the money which would have been due on completion is not essential.¹⁸⁶ Where an action is in affirmance of a contract, an offer of readiness to pay is material. A sufficient allegation of return is, "that on [etc.], as soon as he had ascertained that the said misrepresentations were

177 *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

178 *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122.

179 *Harrington v. Paterson*, 124 Cal. 542, 57 Pac. 476.

180 *Evans v. Duke*, 140 Cal. 22, 73 Pac. 732.

181 *Buena Vista F. & V. Co. v.*

Tuohy, 107 Cal. 243, 40 Pac. 386.

182 *Sublette v. Tinney*, 9 Cal. 423; *Carpentier v. Oakland*, 30 Cal. 444.

183 *Noonan v. Lee*, 2 Black, 499, 17 L. Ed. 278.

184 *Adams v. Preston*, 22 How. 473, 16 L. Ed. 273.

185 *Crossgrove v. Himmelrich*, 54 Pa. St. 203.

186 *Id.*

untrue, he demanded of defendant a return of said . . . dollars, which the defendant refused, and still refuses.”

§ 6880. **Disavowal of sale—Essential allegations.**—On a fraudulent purchase, the seller may disavow the sale and reclaim the goods, or affirm the sale and sue for their price; and in the latter case it seems that an injunction may be granted under section 219 of the New York code, restraining the buyer from disposing of the goods.¹⁸⁷ It need not be alleged that the transferee received the goods without notice or without consideration. He must prove that he paid value and acted in good faith.¹⁸⁸ He who would rescind a sale for fraud must act diligently upon discovering the fraud, and must show himself not only willing but able to return the property received by him.¹⁸⁹

§ 6881. **Injunction.**—Where the transfer has already been made, none but a judgment creditor can restrain a disposition of the property by the fraudulent assignee.¹⁹⁰

§ 6882. **Condonation of fraud.**—If the vendee of property discovers that he has been defrauded before he has paid the purchase price, and with that knowledge accepts a conveyance, he cannot refuse to pay; and if he has paid, cannot maintain an action for deceit.¹⁹¹ Fraud may be condoned by seeking favors of the defrauding party after discovery of the fraud;¹⁹² but soliciting a loan that was promised at the time of the trade, and accepting a deed to the water-right to the land, with the repayment of the water-tax assessment, is not sufficient to make a condonation.¹⁹³

§ 6883. **Fraud upon court.**—A complaint in an action by a creditor of the estate of a decedent to set aside an order setting apart a probate homestead to the defendant as the widow of a

¹⁸⁷ *Malcolm v. Miller*, 6 How. Pr. 456; *Erpstein v. Berg*, 13 How. Pr. 91.

¹⁸⁸ *Tallman v. Turck*, 26 Barb. 167. Compare *Stevens v. Hyde*, 32 Barb. 171.

¹⁸⁹ *Toby v. Oregon etc. R. R. Co.*, 98 Cal. 490, 33 Pac. 550.

¹⁹⁰ *Reubens v. Joel*, 13 N. Y. 488;

Bayaud v. Fellows, 28 Barb. 451; *Perkins v. Warren*, 6 How. Pr. 341; *Sebring v. Lant*, 9 How. Pr. 346.

¹⁹¹ *Kingman Co. v. Stoddard*, 85 Fed. 740, 29 C. C. A. 413.

¹⁹² *Schmidt v. Mesmer*, 116 Cal. 267, 48 Pac. 54.

¹⁹³ *Montgomery v. McLaury*, 143 Cal. 92, 76 Pac. 964.

deceased, which charges a willful suppression of a material truth and the suggestion of a falsehood by the defendant, with intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and avers that such suppression and suggestion had the intended effect, to the injury of the plaintiff, who was one of such creditors, states facts constituting fraud, of which the plaintiff is entitled to complain.¹⁹⁴ If the plaintiff relies on fraud and deception practiced on the court in the matter of evidence, the complaint must show that he was thereby defrauded of his opportunity to defend, and that his defense would otherwise have been effectual.¹⁹⁵ A party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered.

§ 6884. **Fraud, how alleged.**—Where a creditor files a bill to cancel and set aside a judgment rendered against his debtor on the ground that it is fraudulent, it is not sufficient to aver in general terms that said judgment or conveyance was fraudulent; the facts and circumstances constituting the alleged fraud must be set forth. And if he wishes, in addition, to reach the property of the debtor and have it applied in satisfaction of his demand, the complaint must aver either that the plaintiff has acquired a lien on the property he seeks to reach or that he has recovered a judgment upon which an execution has been issued and returned and no property found.¹⁹⁶ Where plaintiff alleged that he was satisfied that defendant secured certain property through fraud, the issue tendered was immaterial in not presenting a point upon which the case could be decided upon its merits.¹⁹⁷

§ 6885. **Setting aside judgment—Fraud and mistake of attorney.**—A complaint in an equitable action to set aside a judgment and to obtain a new trial on the ground that by the negligence, fraud, and mistake of plaintiff's attorney plaintiff had lost his right to appeal from such judgment, which makes no charge of fraud against the defendant, nor of collusion between defendant and plaintiff's attorney, nor that the plaintiff did not have a fair and impartial trial, does not state facts sufficient

¹⁹⁴ *Wickersham v. Comerford*, 96 Cal. 433, 31 Pac. 358.

¹⁹⁵ *Riddle v. Baker*, 13 Cal. 295.

¹⁹⁶ *Castle v. Bader*, 23 Cal. 75. See, also, *Snow v. Halstead*, 1 Cal. 359.

¹⁹⁷ *Snow v. Halstead*, 1 Cal. 361.

to constitute a cause of action.¹⁹⁸ A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise.¹⁹⁹

§ 6886. **Allegations of complaint.**—The complaint in an action for deceit or fraud in the purchase or sale of property, induced or procured by false representations, should aver their falsity, and that they were made with the intent to deceive the plaintiff, and induce him to make the purchase in question, and that they did induce such trade to the plaintiff's injury.²⁰⁰ The plaintiff must in substance aver not only that the defendant made the representations to induce the plaintiff to purchase, but that they were intended to defraud or deceive him.²⁰¹ Thus where a complaint alleged that at the sale and transfer of a note and mortgage "the defendant represented to the plaintiff that said mortgage was good, and a valid security for the payment of said note, and the plaintiff supposed and verily believed at the time he bought the same as aforesaid the said mortgage to be good, and that it was a valid and sufficient security," etc., it was held to be a sufficient allegation that the plaintiff purchased on the faith of the defendant's representations.²⁰² and averring "that defendant falsely pretended to be the owner" of a certain chattel, and "that he fraudulently sold it to the plaintiff, whereby he became liable," fixes the gravamen of the action as fraud.²⁰³ A complaint alleging that plaintiff was induced to purchase a certain tract of land by the false representations of defendant that she owned it, which she knew to be false, and which was made by her with intent to deceive, is sufficient in suit for damages.²⁰⁴ as is also a complaint alleging that defendant fraudulently represented to plaintiff that his mining location was valid, that its discovery-shaft was

¹⁹⁸ *Davis v. Chalfant*, 81 Cal. 627, 22 Pac. 972.

¹⁹⁹ *Carpentier v. Hart*, 5 Cal. 407. For a complaint to set aside a judgment on the ground of newly discovered evidence, and for fraud, see *Munn v. Worrall*, 16 Barb. 221; *Hamel v. Grimm*, 10 Abb. Pr. 150. To restrain a corporation from enforcing a judgment, on the ground that it has ceased to be a corporation, see *Sutherland v. Lagro etc. Co.*, 19 Ind. 192.

²⁰⁰ *Barber v. Morgan*, 51 Barb. 116.

²⁰¹ *Id.*

²⁰² *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757.

²⁰³ *Edick v. Crim*, 10 Barb. 445. See *McGovern v. Payn*, 32 Barb. 83. That actions of this description are founded on the fraud, and not on the contract, see *McDuffie v. Beddoe*, 7 Hill, 578.

²⁰⁴ *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321.

within its exterior boundaries, that the representations were false, and made with intent to mislead plaintiff, who relied thereon and purchased the mine, which it would not have done had it known that the discovery-shaft was on a previously patented lode.²⁰⁵ The action may be maintained though there was no consideration.²⁰⁶ The averment of price paid goes only to the amount of damages.

A sale made upon a valuable consideration is not vitiated by the fraudulent purpose of the grantor, unless the grantee be chargeable with notice of such intention. And a pleading setting up fraud in such case, which fails to charge the grantee with notice or knowledge of the grantor's fraudulent design, is defective.²⁰⁷

§ 6887. **Averment of fraud.**—A general averment that the officers of a corporation acted "with intent to deceive and defraud those who might become purchasers and owners of the stock," was held sufficient on demurrer.²⁰⁸ Alleging that one "falsely and fraudulently represented" a thing to be what it was not is not enough. Knowledge or intent to deceive on the part of the defendant must be alleged.²⁰⁹ A general allegation of fraud will not be regarded.²¹⁰ The facts constituting constructive fraud must be set out the same as in case of actual fraud.²¹¹

§ 6888. **Time must be alleged.**—There must be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether by the exercise of ordinary diligence the discovery might not have been before made.²¹²

§ 6889. **Knowledge and intent.**—A complaint which fails to allege that the representations were made by defendant with

205 *Connell v. El Paso Gold Min. Co.*, 33 Colo. 30, 78 Pac. 677.

206 *Barney v. Dewey*, 13 Johns. 224, 7 Am. Dec. 372; *Corwin v. Davidson*, 9 Cow. 22.

207 *Seeleman v. Hoagland*, 19 Colo. 231, 34 Pac. 995. See *De Votie v. McGerr*, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923; *Grimes v. Hill*, 15 Colo. 359, 25 Pac. 698; *Prewit v. Wilson*, 103 U. S. 22, 26 L. Ed. 360.

208 *Morse v. Swits*, 19 How. Pr. 275.

209 *Mabey v. Adams*, 3 Bosw. 346.

210 *Oroville etc. R. R. Co. v. Supervisors*, 37 Cal. 354.

211 *Feeney v. Howard*, 79 Cal. 529, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826; *Bickle v. Irvine*, 9 Mont. 251, 23 Pac. 244.

212 *Stearns v. Page*, 7 How. 819, 12 L. Ed. 928.

knowledge of their falsity, and with intent that plaintiff should act thereon, is bad on demurrer.²¹³ If positively or recklessly made without knowledge, such averment must be made.²¹⁴

§ 6890. **Facts must be alleged.**—A bill for relief on the ground of fraud must be specific in stating the facts which constitute the fraud. It is not sufficient to charge fraud in general terms.²¹⁵ Something more than mere innuendo or inference is required; it should appear that defendant made a representation intending plaintiff to act upon it; that it was false, that plaintiff believed it, acted upon it, and was damaged.²¹⁶ And without the averment of such facts, the expressions “fraudulently,” “deceitfully,” or “by mistake,” will not bring the case within the equitable jurisdiction, even on a demurrer to the bill.²¹⁷ In imputing fraud, the term itself need not be used if the facts stated amount to it.²¹⁸ No allegation of fraud is necessary in the complaint in an action founded on a warranty deed. Any allegation of fraud in such complaint, when not essential, may be disregarded.²¹⁹ In case of a warranty, the *scienter* need not be alleged.²²⁰ But the fraud or deceit must be substantially alleged.²²¹ It is not necessary, however, to set out in detail all the minute facts in the case, as the ultimate facts, and not the evidence, should be pleaded.²²² The

²¹³ Colorado Springs Co. v. Wight, 44 Colo. 179, 96 Pac. 820; Kemmerer v. Pollard, 15 Idaho, 34, 96 Pac. 206; Connell v. El Paso Gold Min. Co., 33 Colo. 30, 78 Pac. 677.

²¹⁴ Northwestern S. S. Co. v. Dexter Horton & Co., 29 Wash. 565, 70 Pac. 59; Nash v. Rosesteel, 7 Cal. App. 504, 94 Pac. 850.

²¹⁵ Kent v. Snyder, 30 Cal. 666; Castle v. Bader, 23 Cal. 65; Moore v. Greene, 19 How. 69, 15 L. Ed. 533; Beaubien v. Beaubien, 23 How. 190, 16 L. Ed. 484; Parley's Park S. M. Co. v. Kerr, 3 Utah, 235, 2 Pac. 709; Rasmussen v. McKnight, 3 Utah, 315, 3 Pac. 83; Ockendon v. Barnes, 43 Iowa, 615; Hale v. Walker, 31 Iowa, 344, 7 Am. Rep. 137; Williams v. First Presb. Soc., 1 Ohio St. 478; Leavenworth etc. R. R. Co. v. Douglas County, 18 Kan. 169; Clark v. Dayton, 6 Neb. 192. That particular fraudulent acts should be pointed out and

stated, see Robinson v. Dolores etc. Canal Co., 2 Colo. App. 17, 29 Pac. 750. See Price v. Utah etc. Ry. Co., 4 Utah, 72, 6 Pac. 528.

²¹⁶ Butte Hardware Co. v. Knox, 28 Mont. 111, 72 Pac. 301; Power & Bro. v. Turner, 37 Mont. 521, 97 Pac. 950.

²¹⁷ Magniac v. Thompson, 2 Wall. Jr. 209, Fed. Cas. No. 8957, 15 How. 281, 14 L. Ed. 696.

²¹⁸ Attorney-General v. Corporation of Poole, 4 Myl. & Cr. (18 Eng. Ch.) 17; S. C. (8 L. J., N. S.), Ch. 27; Whittlesey v. Delaney, 73 N. Y. 571.

²¹⁹ Quintard v. Newton, 5 Rob. 72.

²²⁰ Holman v. Dord, 12 Barb. 336.

²²¹ Cade v. Head Camp etc. Woodmen of the World, 27 Wash. 218, 67 Pac. 603; Everston v. Miles, 6 Johns. 138; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Cazeaux v. Mali, 25 Barb. 578.

²²² Cummings v. Thompson, 18

burden of charging as well as of proving fraud is on the party alleging it. Mere conclusions will not avail.²²³ A general allegation that the grantee procured the deed by false and fraudulent representations and practices, and by undue and improper influence, is insufficient, without stating the nature of the alleged representations.²²⁴ Where upon the facts the law adjudges fraud, still it is not therefore indispensable that the complaint should in terms allege fraud, and its omission does not substantially vary the cause of action.²²⁵ Fraud, when relied upon, must be pleaded; that is, the facts constituting the fraud must be set forth. The decisions in support of this rule are very numerous.²²⁶ Fraud must be alleged whenever it constitutes an element of a cause of action or of a defense which is of an affirmative nature, and invoked as conferring a right against the opposite party.²²⁷ But this rule does not require or justify a minute detail of all conversations by which the fraudulent representations are proven, and it is sufficient to aver the fraud in substance and legal effect as proven, and when so averred corroborative statements may be shown.²²⁸ Although a pleading may not in direct terms allege fraud, yet, if the acts constituting the fraud are set forth, the pleading sufficiently alleges fraud to admit of proof thereunder.²²⁹ And it is sufficient to set forth the facts constituting the fraud in ordinary and concise language.²³⁰ A fraudulent intent is one of the facts constituting actual fraud, and must be alleged, but it is enough to allege it in general terms.²³¹ The pleading alleging the discovery of the fraud should state the ultimate facts, and not the probative

Minn. 246; Cowin v. Toole, 31 Iowa, 513; Singleton v. Scott, 11 Iowa, 589.

²²³ Butler v. Viele, 44 Barb. 166.

²²⁴ Id.

²²⁵ Sharp v. Mayor of New York, 40 Barb. 256.

²²⁶ Kemmerer v. Pollard, 15 Idaho, 34, 96 Pac. 206; Hoyt v. Clarkson, 23 Or. 51, 31 Pac. 198; Misner v. Knapp, 13 Or. 135, 57 Am. Rep. 6, 9 Pac. 65; Gray v. Galpin, 98 Cal. 633, 33 Pac. 725; Howard v. Pensacola etc. R. R. Co., 24 Fla. 560, 5 South. 356; Cosgrove v. Fisk, 90 Cal. 75, 27 Pac. 56; People v. Healy, 128 Ill. 9, 15 Am. St. Rep. 90, 20 N. E. 692.

²²⁷ Wetherly v. Straus, 93 Cal.

283, 28 Pac. 1045. See People v. McKenna, 81 Cal. 158, 22 Pac. 488; Burris v. Adams, 96 Cal. 664, 31 Pac. 565; De Votie v. McGerr, 15 Colo. 467, 22 Am. St. Rep. 426, 24 Pac. 923.

²²⁸ Hick v. Thomas, 90 Cal. 289, 27 Pac. 208, 376.

²²⁹ Rathbone v. Frost, 9 Wash. 162, 37 Pac. 298; Andrews v. King County, 1 Wash. 46, 22 Am. St. Rep. 136, 23 Pac. 409.

²³⁰ Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111.

²³¹ Id.; Feeney v. Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. 984, 4 L. R. A. 826. See Sukeforth v. Lord, 87 Cal. 399, 25 Pac. 497.

facts or conclusions of law.²³² And an allegation of fraud is held to be insufficient, unless the facts alleged are sufficient to constitute a fraudulent breach of duty.²³³

§ 6891. **Essential averments.**—The intention to influence the plaintiff by false representations should be alleged.²³⁴ The complaint must show what the representations were.²³⁵ And the falsity must be shown to have existed at the time the representations were made.²³⁶ That he falsely and fraudulently represented, etc., it has been held is sufficient averment of knowledge that his representations were false.²³⁷ Where goods were sold upon the false representations of the purchaser, no title to them passed by the sale.²³⁸ But such false representations will not avoid the sale unless it appears that the seller was thereby induced to do that which he would probably not have done but for them.²³⁹ To recover, the fraud must have been practiced on the complainant.²⁴⁰ And no recovery can be had for a fraudulent representation without allegation and proof of damage.²⁴¹

§ 6892. **Averting fraudulent sale.**—In an action to recover back property which had been fraudulently obtained upon credit, it is not necessary to aver that the plaintiff tendered back the notes received of the purchaser. The fact of tendering back such notes only goes to show that the plaintiff has not affirmed the contract after he had knowledge of the fraud.²⁴² Deceit on the part of the defendant and damage to the plaintiff are the cause of action, without alleging that the defendant reaped

²³² *Lataillade v. Orena*, 91 Cal. 565, 25 Am. St. Rep. 219, 27 Pac. 924.

²³³ *Applegarth v. McQuiddy*, 77 Cal. 408, 19 Pac. 692.

²³⁴ *Connell v. El Paso Gold Min. Co.*, 33 Colo. 30, 78 Pac. 677; *Hoffman v. Kirby*, 136 Cal. 26, 68 Pac. 321; *Cazeaux v. Mali*, 25 Barb. 578.

²³⁵ *Wells v. Jewett*, 11 How. Pr. 242.

²³⁶ *Bell v. Mali*, 11 How. Pr. 254.

²³⁷ *Thomas v. Beebe*, 25 N. Y. 244; *Bayard v. Malcolm*, 2 Johns. 550, 3 Am. Dec. 450. Compare *Evertson v. Miles*, 6 Johns. 138; *Panton v. Holand*, 17 Johns. 92, 8 Am. Dec. 369.

²³⁸ *Martin v. Levy*, Cal. Sup. Ct., July Term, 1869; citing *Bell v. Ellis*, 33 Cal. 620.

²³⁹ *Kloppenstien v. Mulcahy*, 4 Nev. 296.

²⁴⁰ *Simpson v. Wiggins*, 3 Woodb. & M. 413, Fed. Cas. No. 12887. The doctrine of fraud in sales discussed in *Smith v. Richards*, 13 Pet. 26, 10 L. Ed. 42; *Blydenburg v. Welsh*, Baldw. 331, Fed. Cas. No. 1583. See *Seeleman v. Hoagland*, 19 Colo. 231, 34 Pac. 995.

²⁴¹ *London etc. Ins. Co. v. Liebes*, 105 Cal. 203, 38 Pac. 691; *Holton v. Noble*, 83 Cal. 7, 23 Pac. 58.

²⁴² *King v. Fitch*, 1 Keyes, 432.

any benefit or advantage therefrom.²⁴³ So of the assertion of a falsehood with a fraudulent design, when a direct and positive injury arises from the assertion.²⁴⁴ The mere insolvency of the purchaser of goods on credit, although well known to himself, if no false representations are made, and no artifice used, will not avoid a sale to him.²⁴⁵ If the complaint states the representations that were made, stating them as representations of facts, made by defendants of their own knowledge, and not as expressions of opinion or belief, that they were false, that plaintiff relied on them, and that he suffered damages thereby, they will be sufficient.²⁴⁶ A complaint averring a fraudulent agreement between the defendant L. and another (composing a firm) and G., to obtain goods on G.'s credit, on representations made by L. of G.'s solvency, and that the representation of L. and the purchase of G. "were made in pursuance of such fraudulent agreement, and were a device and contrivance," was held sufficient.²⁴⁷

§ 6893. **Averment of restitution.**—A complaint to rescind notes and mortgages upon the ground of fraud in their procurement must state facts showing that the plaintiff has performed, or offered to perform, on his part every act necessary to place the defendant in as good situation as he was before the contract was made,²⁴⁸ and that promptly upon discovery.²⁴⁹ A complaint to rescind a conveyance on the ground that the stock of goods taken in consideration therefor was not as represented, which shows that the goods were delivered to the plaintiff as agreed, but fails to state when the fraud was discovered, or that the goods were returned or tendered to the defendant, is bad on general demurrer.²⁵⁰ But an offer to restore the consideration

²⁴³ *White v. Merritt*, 7 N. Y. 352, 57 Am. Dec. 527.

²⁴⁴ *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623. For the proper mode of pleading in such actions, for fraudulently inducing third person to represent an insolvent as worthy of credit, see *Addington v. Allen*, 11 Wend. 374.

²⁴⁵ *Klopenstein v. Mulcahy*, 4 Nev. 296. See *Gainesville Nat. Bank v. Bamberger*, 77 Tex. 48, 19 Am. St. Rep. 738, 13 S. W. 959; *Morris v. Taleott*, 96 N. Y. 100. As to the

necessity of this averment, see *Zabriskie v. Smith*, 13 N. Y. 330, 64 Am. Dec. 551; *Addington v. Allen*, 11 Wend. 386.

²⁴⁶ *Sharp v. Mayor of New York*, 40 Barb. 256.

²⁴⁷ *Ballard v. Lockwood*, 1 Daly, 158.

²⁴⁸ *Buena Vista etc. Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386.

²⁴⁹ *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000.

²⁵⁰ *Walker v. Pogue*, 2 Colo. App. 149, 29 Pac. 1017.

of a deed which is sought to be set aside, if averred in the language of the statute, is sufficient as against a general demurrer.²⁵¹ An averment to offer to reconvey the lands in respect to which plaintiff has been defrauded, on condition of a reconveyance from the defendant, is proper, even in case of an affirmation of the contract, as showing a willingness to do equity.²⁵² A complainant in an action to rescind a contract for purchase of land on the ground of fraud must, in his bill, offer to return the land purchased.²⁵³ But if plaintiff has other claims, and defendant is unable to restore some of the property, plaintiff need not make such offer before commencing suit.²⁵⁴ The vendee, upon discovering the fraud, may return or tender back what he received, recover that due him, and have a vendor's lien for the amount so recovered.²⁵⁵ An offer to refund such sum as shall be decreed is a sufficient offer to do equity, where an accounting is necessary.²⁵⁶ The complaint must show plaintiff not only willing but able to return the property received by him.²⁵⁷

§ 6894. **Pleading—Action for damages.**—To maintain an action to recover damages for deceit in inducing plaintiff to purchase worthless property, it is not necessary to show a return, or to offer to return the property. The action is *ex delicto*, and not upon contract; and an averment in the complaint of an offer to return may be disregarded.²⁵⁸ Where the purchaser of personalty retains the property, and does not offer to rescind, the sale is ratified, and the action becomes one in tort for fraud.²⁵⁹

§ 6895. **Ambiguous averments.**—Where the complaint alleges, "that by virtue of the covenants of said deed, said B. M. covenanted and agreed that she had title to said premises, and the right to convey the same, and that she had not prior thereto conveyed the same to any person except to said plaintiff and W.," and that relying solely upon the said representations

²⁵¹ Hick v. Thomas, 90 Cal. 289, 27 Pac. 208, 376.

²⁵² Montgomery v. McLaurry, 143 Cal. 83, 76 Pac. 964.

²⁵³ Murphy v. McVicker, 4 McLean, 252, Fed. Cas. No. 9951.

²⁵⁴ California Farm etc. Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593; Matteson v. Wagoner, 147 Cal. 744, 82 Pac. 436.

²⁵⁵ Rhodes v. Arthur, 19 Okla. 520, 92 Pac. 244.

²⁵⁶ Sutter v. Baum, 66 Cal. 44 at 52, 4 Pac. 916.

²⁵⁷ Toby v. Oregon Pacific Ry., 98 Cal. 490, 33 Pac. 550.

²⁵⁸ Miller v. Barber, 66 N. Y. 558.

²⁵⁹ Kemmerer v. Pollard, 15 Idaho, 34, 96 Pac. 206.

"made by B. M., that she was the owner of the premises, they accepted and received the deed in part payment of a pre-existing debt," and that "by means of which false and deceptive representations" they have suffered damages in the sum of, etc., it was held ambiguous and uncertain.²⁶⁰

§ 6896. **Demurrer.**—Any uncertainty and ambiguity in the complaint is waived by failure to demur on that ground.²⁶¹ A general demurrer does not reach redundant and ambiguous matter in the complaint.²⁶²

§ 6897. **Limitation of actions for fraud.**—Limitations do not begin to run against the party wronged, as the holder of warrants, until he receives notice or knowledge of the fraud.²⁶³ If the defrauded one has his suspicions aroused, and has it in his power to discover the fraud, but does not, the time begins to run from the date of such suspicions.²⁶⁴ However, an heir, being absent from the state, not discovering the fraudulent probate of a will, is barred at the end of the one-year limitation.²⁶⁵ If the fraud is disclosed by public records, the time runs from the date of their filing.²⁶⁶ An express trust never having been fully performed, time does not run against it.²⁶⁷

§ 6898. **Judgment by confession.**—Where a judgment by confession is attacked by a creditor as fraudulent against him, on the ground that the object of the debtor and the judgment creditor was to assist the debtor in forcing a compromise with his other creditors, rather than to enforce the judgment, the complaint must plead this ground of objection to the judgment. A general averment that the intent was to hinder, delay, and defraud will not put the adverse party on his defense.²⁶⁸ A

²⁶⁰ Lawrence v. Montgomery, 37 Cal. 183.

²⁶¹ Montgomery v. McLaury, 143 Cal. 83, 76 Pac. 964.

²⁶² Anderson v. Bank of Lassen County, 140 Cal. 695, 74 Pac. 287.

²⁶³ Cal. Code Civ. Proc., § 338; People v. Perris Irr. Dist. 142 Cal. 601, 76 Pac. 381; Fogg v. Perris Irr. Dist. 142 Cal. xviii, 76 Pac. 1127; Northwestern Lumber Co. v. City of Aberdeen, 35 Wash. 636, 77 Pac. 1063;

Evans v. Duke (Cal.), 69 Pac. 688.

²⁶⁴ Smith v. Martin, 135 Cal. 247, 67 Pac. 779; Simpson v. Dalziel, 135 Cal. 599, 67 Pac. 1080.

²⁶⁵ In re Davis Estate, 136 Cal. 590, 69 Pac. 412.

²⁶⁶ Irwin v. Holbrook, 32 Wash. 349, 73 Pac. 360.

²⁶⁷ Felkner v. Dooly, 27 Utah, 350, 75 Pac. 854.

²⁶⁸ Meeker v. Harris, 19 Cal. 278, 79 Am. Dec. 215.

judgment by confession, where the court has jurisdiction of the subject-matter and the parties, however irregular and erroneous it may be, cannot be called in question in a collateral proceeding, if it was entered in open court, and regularly signed by the judge under the existing practice.²⁶⁹ It may be attacked for fraud by creditors of the judgment debtor who were defrauded thereby, and that in some direct proceeding, before the sale of the property under it to innocent parties.²⁷⁰

§ 6899. **Judgment by default.**—In a suit in equity, to set aside a judgment by default on a return by the sheriff of personal service, on the ground that defendant in fact was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought, it was held that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was or has been at any time ready or willing, to perform the same.²⁷¹

§ 6900. **Judgment on stipulation.**—Where a judgment was entered upon a stipulation of the attorneys in the action, and the defendants in the action subsequently brought a suit to annul the judgment for fraud and collusion, the facts and circumstances, and the merits of their defenses in the former suit, are a part of the subsequent action, and may be shown.²⁷²

§ 6901. **Proof.**—The burden of proof, by a preponderance of evidence, is upon the one alleging fraud,²⁷³ and a great latitude should be allowed in the introduction of evidence.²⁷⁴ The evidence must do more than create a suspicion of fraud, where no

269 *Cloud v. El Dorado County*, 12 Cal. 133, 73 Am. Dec. 526; *Arrington v. Sherry*, 5 Cal. 513.

270 *Miller v. Earle*, 24 N. Y. 111. See *Wilcoxon v. Burton*, 27 Cal. 229, 87 Am. Dec. 66; cited in *Lee v. Figg*, 37 Cal. 328, 99 Am. Dec. 271.

271 *Gibbons v. Scott*, 15 Cal. 284.

272 *Preston v. Hill*, 38 Cal. 686.

273 *Keel v. Levy*, 19 Or. 450, 24 Pac. 253; *Allen v. Elrick*, 29 Colo. 118, 66 Pac. 891.

274 *Brakefield v. Shelton*, 76 Kan. 451, 92 Pac. 709.

confidential relationship exists.²⁷⁵ However, direct and positive proof is not essential.²⁷⁶

§ 6902. **Fraud—Allegata et probata.**—Where a party seeks relief on the ground of fraud perpetrated by another, he must not only allege, but must also prove, that he relied upon, and was, innocently on his part, misled by, the fraudulent statements of the other party, and unless the evidence shows this, there is a failure of proof.²⁷⁷ Fraud must be proven by a preponderance of the evidence.²⁷⁸

§ 6903. **Fraud at election.**—Attempted allegations of fraud at an election on the organization of a new county which state no facts sufficient to constitute such fraud are only of conclusions of law, and a special demurrer to such allegations is properly sustained.²⁷⁹

§ 6904. **Transfer in fraud of creditors—Pleading.**—When a creditor attacks a transfer of property made by his debtor on the ground that it was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner and under such circumstances as to have that effect. It must therefore appear that at the time the conveyance was made the debtor had no other property subject to execution out of which his debts could be satisfied.²⁸⁰ And where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that at the time the action is commenced the debtor has no other property sufficient to satisfy his debts.²⁸¹ It is not sufficient merely to characterize the conveyance as pretended and fraudulent, in the absence of averment of facts showing to the court how it was such.²⁸² The fraudulent intent of the grantor is a fact necessary to be alleged

²⁷⁵ Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029; Levy v. Scott, 115 Cal. 42, 46 Pac. 892; Casey v. Leggett, 125 Cal. 671, 58 Pac. 264.

²⁷⁶ Phipps v. Willis (Or.), 96 Pac. 866.

²⁷⁷ Pearce v. Buell, 22 Or. 29, 29 Pac. 78.

²⁷⁸ Keel v. Levy, 19 Or. 450, 24 Pac. 253.

²⁷⁹ People v. County of Glenn, 100 Cal. 419, 38 Am. St. Rep. 305, 35 Pac. 302.

²⁸⁰ Deutsch v. Korsmeier, 59 Ind. 373; Pfeifer v. Snyder, 72 Ind. 78; Albertoni v. Branham, 80 Cal. 631, 13 Am. St. Rep. 200, 22 Pac. 404.

²⁸¹ Id.; Sherman v. Hogland, 73 Ind. 472.

²⁸² Pehrson v. Hewitt, 79 Cal. 594, 21 Pac. 950.

in the complaint.²⁸³ An allegation that a certain deed was made “for the purpose of hindering, delaying, and defrauding the creditors” of the grantor, but stating no other facts indicating fraud, is held insufficient to sustain a decree, for the reason that it states only a conclusion.²⁸⁴ Mere general allegations imputing motives of fraud are not sufficient in any case.²⁸⁵ In an action to set aside a fraudulent conveyance, an allegation in the complaint that the plaintiff had obtained a specific lien upon the property sought to be subjected to his judgment is unnecessary.²⁸⁶

FORMS—FRAUD.

§ 6905. Complaint for rescission of contract, on the ground of fraud.

Form No. 1829.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., the plaintiff was the owner of a farm situated in the state of . . . , county of . . . [describing it].

II. That the plaintiff then was, and ever since has been, old, infirm, and blind, and wholly incapacitated from attending to business, and the defendants on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form.

III. That on the . . . day of . . . , 19.., the plaintiff demanded possession of said writing of the defendants, or information as to the contents thereof, but the defendants refused to surrender the same, or to give him any information concerning the same.

IV. That the plaintiff is informed and believes that the said writing is under seal, and is a deed of said premises, and conveys the same or some interest therein to the defendants; and they

²⁸³ Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Bull v. Bray, 89 Cal. 286, 26 Pac. 873, 13 L. R. A. 576. See Bull v. Ford, 66 Cal. 176, 4 Pac. 1175.

²⁸⁴ Leasure v. Forquer, 27 Or. 334, 41 Pac. 665.

²⁸⁵ Rowland v. Coleman, 45 Ga. 204.

²⁸⁶ Klosterman v. Mason Co. etc. R. R. Co., 8 Wash. 281, 36 Pac. 136.

intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Wherefore the plaintiff demands judgment:

1. That the said writing be decreed by this court to be void.
2. That the defendants produce the said writing, and deliver it up to be canceled.
3. For costs of this action.

§ 6906. Complaint for procuring property by fraud.

Form No. 1830.

[TITLE.]

The plaintiff complains and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that he was solvent, and worth . . . dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell [and deliver] to the defendant, certain [goods, wares and merchandise] of the value of . . . dollars, described as follows: [description of goods].

III. That the said representations were false [negative each false statement specifically], and were then known by the defendant to be so.

IV. That the defendant has not paid for the said goods.

Wherefore plaintiff prays:

1. That defendant be restrained and enjoined from disposing of any of the hereinabove described goods.
2. That said goods be decreed to be the property of plaintiff and that the same be returned into the possession of plaintiff.
3. That he have judgment against defendant for . . . dollars damages and for the costs of this action.

§ 6907. Complaint against a fraudulent purchaser and his transferee.

Form No. 1831.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.., at . . . , the defendant A. B., for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth . . . dollars over all his liabilities].

II. That the plaintiff was thereby induced to sell and deliver to the said A. B. [one thousand cases of machine oils, more particularly described as follows:].

III. That at the time of making the said representations, the said A. B. was insolvent, and knew himself to be so.

IV. That the said A. B. afterwards transferred the said goods to the defendant C. D.

Wherefore the plaintiff demands judgment:

1. For the possession of the said goods, or for . . . dollars, in case such possession cannot be had. —

2. For . . . dollars damages for the detention thereof. —

§ 6908. Complaint for fraudulently procuring credit to be given to another person.

Form No. 1832.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19. . . , at . . . , the defendant represented to the plaintiff that one C. D. was solvent and in good credit, and worth . . . dollars over all his liabilities.

II. That the plaintiff was thereby induced to sell to the said C. D. [state articles sold] of the value of . . . dollars [on . . . months' credit].

III. That the said representations were false in this, that the said C. D. was not then and there solvent and in good credit, and worth . . . dollars over all his liabilities, but, on the contrary thereof, the said C. D. was then and there insolvent and not in good credit, all of which was well known to the defendant, and said representations were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff].

IV. That the said C. D. did not pay for the said goods at the expiration of the credit aforesaid [or has not paid for the said goods, and the plaintiff has wholly lost the same by reason of the premises].

[DEMAND OF JUDGMENT.]

§ 6909. Complaint against directors of a corporation for damages caused by their misrepresentations.

Form No. 1833.

[TITLE.]

The plaintiff complains, and alleges:

I. That before the time hereinafter mentioned, at . . . , a corporation was formed, or pretended to be formed, for the purpose of insuring property against losses by fire, and for other purposes; which corporation was named the . . . insurance company.

II. That the said company was organized or pretended to be organized under the provisions of a law of this state, passed [date of act], entitled "An act," [etc.].

III. That the charter of the said company provided, among other things, that the capital thereof should be . . . dollars, to be paid up in cash.

IV. That at the times hereinafter mentioned, the defendants were [or represented themselves to be] directors of said company.

V. That at sundry times between the . . . day of . . . , 19.. , and the . . . day of . . . , 19.. , the defendants represented to the public at large [or to the plaintiff] that the said company had a paid-up cash capital of . . . dollars.

VI. That on the . . . day of . . . , 19.. , at . . . , the defendants published a statement showing that the profits of the said company amounted to . . . dollars, and declared a dividend of . . . per cent.

VII. That the said representations were wholly false, and were then known by the defendants to be so, and were made with intent to deceive and defraud the public, and to induce persons to insure with the said company; that the said company never had a cash capital of more than . . . dollars, and had not on the said . . . day of . . . , 19.. , more than . . . dollars profits.

VIII. That by the said representations the plaintiff was induced to insure with the said company, which accordingly issued to him a policy of insurance, of which a copy is hereto annexed, marked "Exhibit A."

IX. That on the . . . day of . . . , 19.. , the property mentioned in the said policy was destroyed or greatly injured by fire, and the plaintiff's loss thereon amounted to . . . dollars.

X. That on the . . . day of . . . , 19.. , at . . . , the plaintiff obtained judgment against the said company upon the said policy, for . . . dollars, in the . . . court of . . .

XI. That on the [same day] an execution was issued upon the said judgment, against the property of said company, to the sheriff of the county of . . . , which was returned wholly unsatisfied.

XII. That by reason of the premises, the plaintiff has lost the whole amount of the said judgment.

[DEMAND OF JUDGMENT.]

[Annex copy of policy, marked "Exhibit A."']

§ 6910. **Complaint against seller—For fraudulently representing chattels to be his property.**

Form No. 1834.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant offered to sell to the plaintiff a certain horse, and, with intent to deceive and defraud the plaintiff, did falsely and fraudulently represent to him that the said horse was his property.

II. That the plaintiff, relying on said representations, purchased said horse of the defendant, and paid him therefor the sum of . . . dollars.

III. That, in truth, and as defendant then well knew, said horse was not the property of the defendant, but was the property of one A. B.

IV. That thereafter the said A. B. sued this plaintiff in the . . . court to recover the value of said horse, and although this plaintiff used due diligence in the defense of said suit, the said A. B. recovered a judgment against the plaintiff in said court for the sum of . . . dollars, which this plaintiff has since paid.

V. That on the . . . day of . . . , 19.. , notice of the pendency of said suit was given to the defendant [or, that the said defendant appeared as a witness in said action].

VI. That by reason of the premises the plaintiff has been damaged in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6911. **The same—For fraudulently delivering smaller quantity than agreed for.**

Form No. 1835.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff, on the . . . day of . . . , 19.. , at . . . , bought of the defendant, and the defendant sold and agreed to deliver to the plaintiff, one hundred tons of hay, for the price of . . . dollars per ton.

II. That the defendant afterwards, on the . . . day of . . . , 19.., fraudulently delivered to him only ninety tons of hay, as and for the said quantity of one hundred, so bargained for and sold, and pretending it so to be.

III. That the defendant at the time well knew that the hay so delivered contained only the quantity of ninety tons, to the damage of the plaintiff in the sum of . . . dollars.

[DEMAND OF JUDGMENT.]

§ 6912. Complaint in action to set aside judgment fraudulently obtained.

Form No. 1836.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . , day of . . . , 19.., said defendant made and delivered to one N. B. his two certain promissory notes, each for the sum of . . . dollars, payable to the order of said N. B., one of which notes was due and payable on the . . . day of . . . , 19.., the other on the . . . day of . . . , 19.., and which notes bore interest at the rate of . . . per cent per . . . , and afterwards, and before the day next hereinafter mentioned, both of said notes were by the said N. B. indorsed and delivered to the plaintiff, who then became, and now is, the legal indorsee and holder of the same, all of which still remain unpaid.

II. That on the . . . day of . . . , 19.., the plaintiff commenced an action against the defendant to recover the amount due on these notes, and procured an attachment to be issued, which on the same day was levied by the defendant E. N., sheriff of said county of . . . , on seven cows, five calves, one heifer, one cart, one buggy and harness, a quantity of poultry, one stack of hay, containing about three tons, and some hay under a shed, all of the probable value of five hundred dollars.

III. That on the . . . day of . . . , 19.., judgment was entered by the deputy clerk of this court in vacation, wherein the said A. H., S. W. L., and D. F. were named as plaintiffs, and the said J. E. as defendant, in favor of said plaintiffs, and against said defendant for the the sum of . . . dollars, and . . . dollars costs. That the papers comprising the judgment-roll consist [enumerate them, as]: First. Of an affidavit [etc., describe it]; Second. A paper purporting to be signed [etc., describe it]; Third. A bill of costs [etc., describe it].

IV. That, as the plaintiff is informed, and believes to be true, on the said . . . day of . . . , 19. . . , the said A. W., pretending to act as attorney at law of the said H., L., and B., presented to A. M., the deputy clerk of this court, the first four papers heretofore mentioned, which at the time of presenting the same were all attached together, and thereupon requested the deputy clerk to file the same, and to enter up a judgment thereon in favor of said H., L., and B., for . . . dollars, and . . . dollars costs, and to issue immediate execution therefor to the sheriff of this county, all of which the said deputy clerk then and there did, as requested by said W., and said deputy clerk also, at the request of said W. filled out and filed away among the said papers a summons in the said action.

V. That, as plaintiff is informed, and believes to be true, previous and up to the time when said papers so attached together were filed as aforesaid, no complaint had been filed, nor had any suit or action been commenced between said parties; nor had any summons been issued from said clerk's office; nor even the form of one filled up in said action, all of which facts are more fully shown by the affidavit of said A. M., hereto annexed, marked "Exhibit A," and made part of this complaint.

VI. That said P. E., sheriff of this county, received the said execution issued on said judgment on the . . . day of . . . , 19. . . , and on the . . . day of said month levied the same on the property above specified and described, and which levy is prior to said plaintiff's attachment.

VII. The plaintiff further alleges that the said proceedings and circumstances under which said judgment was entered up by the said deputy clerk render the same void in law, the said clerk having no power or jurisdiction to enter such judgment under the circumstances, and in the manner before stated, and that the same is fraudulent as against the plaintiff and tends to his great and irreparable injury; and that the said fraudulent and void judgment was consummated under the advice and by the connivance of said defendant W., who was employed, as plaintiff is informed and believes, by said E., and confederated with him and said H., L., and B., to procure to be entered upon the records of said court said false, covinous, and fraudulent judgment.

VIII. That the defendant E. is insolvent, and has no visible property except the aforesaid, subject to execution.

IX. That defendant E., as such sheriff as aforesaid, has, as

plaintiff is informed and believes, advertised said property for sale under the execution issued upon said fraudulent and void judgment, to be sold on the . . . day of . . . inst., at . . . o'clock, A. M., and if allowed to proceed with said sale, the plaintiff will be prejudiced to the amount of said property, and will probably lose his said debt, and it will produce to him a great and irreparable injury.

Wherefore, the plaintiff prays:

1. For a decree of this court, that the judgment so entered as aforesaid, and the execution thereon issued, may be declared void, as against the plaintiff and the creditors of the said E., and that it, together with the said writ of execution issued thereon may be wholly vacated and annulled.

2. That the said property seized and taken under said execution, and the proceeds of the sale thereof, may be subjected to the writ of attachment issued as aforesaid in the action of the plaintiff against said defendant E., and for such further or other relief as to this court may seem meet in the premises, and for costs of suit against defendants.

3. And in the mean time that an order of injunction may issue out of this court, enjoining and restraining the defendants, their attorneys, agents, and servants, and particularly the said E., as such sheriff, from selling the said property under said execution, and from in any way disposing of or intermeddling with said property, or in any way selling or disposing of said judgment so entered in favor of said H., L., and B., against said E.

[Annex copy of affidavit, marked "Exhibit A."]

§ 6913. Complaint for rescission of contract on ground of mistake.

Form No. 1837.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at . . . , contained twenty acres.

II. That the plaintiff was thereby induced to purchase the same at a price of . . . dollars per acre, in the belief that the said representation was true, and signed an agreement, of which a copy is hereto annexed, and marked "Exhibit A," and made a part thereof; but no deed of the same has been executed to him.

III. That on the . . . day of . . . , 19.. , the plaintiff paid the defendant . . . dollars, as part of such purchase money.

IV. That the said piece of ground contained in fact only ten acres.

Wherefore, the plaintiff demands judgment:

1. For . . . dollars, with interest from the . . . day of . . . , 19..

2. That the said agreement of purchase be delivered up and canceled.

[Annex copy of agreement, marked "Exhibit A."]

§ 6914. Complaint in action to reform conveyance by mistake in boundary.

Form No. 1838.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19.. , the defendant ~~exe~~.cuted and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy: [Give copy of deed.]

II. That the description therein given of the premises intended to be conveyed was erroneous, and in fact does not describe any premises whatever [here insert wherein the error lies]; and that in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intention of the parties, it is necessary that the said description should be amended so as to read as follows: [Here insert correct description of the premises.]

III. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

Wherefore, the plaintiff demands judgment:

1. That said deed be reformed as aforesaid.
2. For costs of this action.

§ 6915. Complaint in action to correct account stated.

Form No. 1839.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff and defendant, having had mutual dealings, on the . . . day of . . . , 19 . . . , came to an accounting, upon which a statement of the said account was made in writing,

a copy of which is annexed as a part of this complaint, marked "Exhibit A," whereby a balance of . . . dollars was found in favor of the defendant.

II. That since the said statement of account, the plaintiff has discovered errors and false charges therein, of which he was wholly ignorant at the time of such statement.

III. That in the statement of said account so settled, he is charged as follows: [State items wrongfully charged, and show the error.]

IV. That the following items, which ought to have been entered to his credit in said account, were by mistake wholly omitted therefrom, to-wit: [Specify the items, with date, amount, etc.]

V. That the said account is incorrect and that the balance thereon should be . . . dollars in favor of the plaintiff, instead of . . . dollars in favor of the defendant.

VI. That as soon as the plaintiff discovered the said errors, to-wit, on the . . . day of . . . , 19 . . . , he pointed the same out to the defendant, and then requested the defendant to correct the same, and to restate the said account correctly, but the defendant refused to do so, or to pay the plaintiff any part of said sum of . . . dollars, in accordance with the stated account as corrected.

Wherefore, the plaintiff asks:

1. That he may be let in to prove the said errors in the stating of the said account, and that the same be corrected.

2. That judgment may be rendered against the defendant for the said balance of . . . dollars, on said corrected account, with interest thereon from the . . . day of . . . , 19

[Annex copy of account.]

§ 6916. Complaint to set aside deed obtained by fraud, and for reconveyance.

Form No. 1840.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the plaintiff was the owner in fee of the following described lands and premises: [describe same], which were of the value of . . . dollars.

II. That the defendant, on that day, offered to purchase said premises, and in order to induce the plaintiff to convey the same to him, offered to transfer and assign to the plaintiff in exchange

therefor [here describe property exchanged; as, for instance: fifty shares of stock in a certain corporation known as the . . . company].

III. That to induce said plaintiff to make said exchange the defendant falsely and fraudulently represented to the plaintiff that [here state the false representations of fact fully and particularly].

IV. That in truth and in fact the representations so made by said defendant were each and all false and fraudulent, as the defendant then well knew; and that he made the same for the purpose of defrauding the plaintiff out of his said land; that [here negative directly and specifically each false statement], all of which the said defendant knew when he made the representations aforesaid.

V. That relying upon said false and fraudulent representations, and believing the same to be true, the plaintiff accepted the defendant's offer, and on the . . . day of . . . , 19 . . . , in consideration of the transfer of said property by defendant to him, the plaintiff made, executed, and delivered to the defendant a deed of the above-described premises [of which deed a copy is hereto annexed, marked "Exhibit A," and made a part of this complaint], and thereupon let the said defendant into possession of said premises, which the defendant now holds.

VI. That the said deed was afterwards, on the . . . day of . . . , 19 . . . , duly recorded in the office of the register of deeds for . . . county in book . . . of deeds, on page

VII. That the plaintiff did not discover the falsity of said representations so made to him by the defendant until the . . . day of . . . , 19 . . . , on which day he tendered back to the defendant [or, offered to return to the defendant] the said personal property so delivered to plaintiff by the defendant [with a properly executed assignment thereof], and demanded that defendant reconvey the said premises to him, this plaintiff [and presented to the defendant a quitclaim deed, duly filled out and ready to be signed and executed for that purpose], and demanded that the defendant give up to the plaintiff the possession of said premises, but that the said defendant wholly refused, and still refuses, to reconvey said land, or to give up the possession thereof.

VIII. That the plaintiff still has said property so transferred to him by defendant and [if property is capable of surrender into court: now brings the same into court for the benefit of the de-

fendant; or, if not: is ready and willing to deliver the same to defendant, as the court shall direct].

Wherefore, the plaintiff demands judgment that said conveyance be canceled, and that the defendant be adjudged to reconvey the said premises to the plaintiff, and deliver possession thereof to the plaintiff; and for such other relief as may be equitable, and for the costs of this action.

[Annex copy of deed.]

§ 6917. Complaint for rescission of contract and repayment of advances on ground of fraud.

Form No. 1841.

[TITLE.]

The plaintiff complains, and alleges:

I. That the plaintiff on the . . . day of . . . , 19.., bargained with the defendant to buy of the defendant a piece of ground at . . . , [briefly designating it], which was chiefly valuable for the purpose of dividing into city lots, and purchased by the plaintiff for that purpose, as defendant well knew.

II. That the defendant, well knowing said premises to contain a much less quantity than . . . acres, viz. . . acres only, then and there falsely and fraudulently represented to him that the premises contained . . . acres; and falsely and fraudulently induced him to buy the said premises for . . . dollars.

III. That plaintiff, relying on said representations, agreed in writing to buy the premises, and paid defendant . . . dollars, part of the purchase money thereof.

IV. That the premises did not contain . . . acres, but only . . . acres; whereby the plaintiff was deprived of all benefit and advantage which he otherwise would have derived from the said sale.

V. That on or about the . . . day of . . . , 19.., as soon as he had ascertained that the said representations were untrue, he tendered to defendant a duly executed quitclaim deed of said lands, and demanded of defendant the rescission of said agreement and a return of said . . . dollars; but defendant refused, and still refuses to consent thereto.

Wherefore, the plaintiff demands judgment for . . . dollars, with interest from the . . . day of . . . , 19 . . . ; that the said agreement of purchase be delivered up and canceled; and that the plaintiff have such other and further relief as may be equitable, with the costs of this action.

§ 6918. Denial of fraud.

Form No. 1842.

[TITLE.]

The defendant answers to the complaint, and denies:

That he obtained the said deed from the plaintiff by fraud or misrepresentation [deny specific acts alleged].

§ 6919. Denial of mistake.

Form No. 1843.

[TITLE.]

The defendant answers to the complaint, and denies:

That there are errors or mistakes in the stating of the said account, as alleged, or at all, but alleges that the account stated which is mentioned in the complaint is correct, true and just.

§ 6920. Decree, setting aside deed obtained by fraud.

Form No. 1844.

[TITLE.]

[Recitals of trial and findings, and continuing]:

It is therefore adjudged, that the deed of conveyance, described in the complaint, purporting to convey [describe premises] from the plaintiff to the defendant, be and the same is hereby vacated, set aside, and annulled, and declared of no force and effect. And that the plaintiff recover from the defendant his costs in the action, taxed at . . . dollars.

§ 6921. Decree, setting aside conveyance as fraudulent and giving leave to proceed in execution.

Form No. 1845.

[TITLE.]

[Recitals of trial, findings, etc., and continuing:]

It is adjudged, that the conveyance [describing it] dated the . . . day of . . . , 19 . . . , executed by the defendant Y. Z. to the defendant W. X., was made with intent to defraud the creditors of the said Y. Z., and is void as against the plaintiff in this action; and that the judgment confessed by the defendant Y. Z. in favor of the defendant U. V. in the . . . court, and entered in the office of the clerk of . . . , for . . . dollars, was made with intent to defraud the creditors of said Y. Z. [or, is insufficient, and, in law, fraudulent, as against the creditors of said Y. Z.]; and that the same, and all the proceedings thereon,

the execution, and the sale thereunder, and the sheriff's certificate of sale, bearing date the . . . day of . . . , 19.. , and his deed, bearing date the . . . day of . . . , 19.. , to the defendant S. T., in pursuance thereof, are each and all void as against the plaintiff in this action [and said judgment is ordered to be canceled and discharged of record by the clerk of this court].

And it is further adjudged, that the plaintiff recover of the defendants [naming which] . . . dollars costs of this action.

And it is further adjudged, that the plaintiff in this action is at liberty to proceed upon his execution heretofore issued upon the judgment in his favor mentioned in the complaint, or to issue another execution, as he may be advised; and that the said defendant [naming him] deliver to the sheriff upon any such execution said property [describing the property reached], to be sold and applied to satisfy said judgment and interest, and also the costs of this action.

CHAPTER CLIV.

SPECIFIC PERFORMANCE.

§ 6922. **Adequate relief—Presumptions.**—It is to be presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation, and that the breach of an agreement to transfer personal property can be thus relieved.¹ A party seeking specific performance of a contract for the sale of personal property must state in his complaint the peculiar facts upon which he relies to take his case out of the general rule that such contracts will not be specifically enforced;² otherwise, if the personal property is simply an incident to the real estate.³ Insolvency of defendant is not alone ground for specific performance of a contract;⁴ but it is an important factor.⁵

§ 6923. **Award—When specifically enforced.**—Courts of equity may enforce a specific performance of an award respecting real estate.⁶ But specific performance of a mere agreement to submit to arbitration will not be decreed.⁷ While a court will not decree specific performance of an agreement to appoint arbitrators or appraisers to fix the value at which property is to be sold, yet where there has been an acquiescence in the agreement, or such part performance that it would be inequitable not to enforce the execution of such provision, the court will ascertain what is the fair value.⁸

§ 6924. **Conditional contract.**—C. agreed in writing to convey to F. an undivided interest in a mining claim, upon the

1 Cal. Civ. Code, § 3387; *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276.

2 *Senter v. Davis*, 38 Cal. 450. But see *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229.

3 *Young v. Porter*, 27 Wash. 551, 68 Pac. 362.

4 *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

5 *Brett v. Warnick*, 44 Or. 511, 102 Am. St. Rep. 639, 75 Pac. 1061.

6 *McNeil v. Magee*, 5 Mason, 244, Fed. Cas. No. 8915.

7 *Tobey v. County of Bristol*, 3 Story, 800, Fed. Cas. No. 14065.

8 *Jerem. Eq. 442*; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Kelso v. Kelly*, 1 Daly, 419.

fulfillment of certain specified conditions to be thereafter performed by F., and let F. into possession. Thereafter, on the failure of C. to convey as stipulated, F., who was at the time out of possession, brought ejectment in the usual form to recover the same. It was held that ejectment would not lie, but that the appropriate remedy of F. was by action for specific performance, and, as incidental thereto, a delivery of possession.⁹ If one who has agreed to convey lands with release of dower is unable to procure a release of dower, the purchaser is entitled to a conveyance without such release of dower, with an abatement from the purchase money of the wife's interest at the time of the conveyance.¹⁰

§ 6925. Conditions precedent.—An instrument purporting to be a grant of real property, to take effect upon condition precedent, passes the estate upon the performance of the condition.¹¹ Notice by one party that he will not perform entitles the other to enforce performance without offering to perform on his part.¹² Impossible and unlawful conditions are void.¹³ A condition involving a forfeiture must be strictly construed against one for whose benefit it is created.¹⁴ Where the purchaser covenants to pay the purchase money, and the vendor covenants to convey at the time of payment, the contract is mutual and dependent, and neither can sue without averring performance, or an offer to perform. Where the purchase money is payable in installments and the conveyance to be executed on the last day of payment, or on payment of the whole price, or at any previous day, the covenants to pay the sums falling due before the execution of the conveyance are independent covenants.¹⁵ But those falling due after the day for execution of the conveyance are dependent.¹⁶

§ 6926. Contract must be certain.—The performance of a contract must be decreed according to its terms.¹⁷ And specific

⁹ *Felger v. Coward*, 35 Cal. 650.

¹⁰ *Davis v. Parker*, 14 Allen, 94.
See *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613.

¹¹ Cal. Civ. Code, § 1110.

¹² Cal. Civ. Code, § 1440.

¹³ Cal. Civ. Code, § 1441.

¹⁴ Cal. Civ. Code, § 1442.

¹⁵ *Hill v. Grigsby*, 35 Cal. 656.

¹⁶ *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91; *Cutter v. Powell*, 2 Smith's Lead. Cas. 22, note; *Hill v. Grigsby*, 35 Cal. 656; *Rourke v. McLaughlin*, 38 Cal. 196.

¹⁷ *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65; *Bowen v. Waters*, 2

performance will not be decreed unless the terms of the contract are clear, definite, and positive.¹⁸ Courts of equity will not attempt to enforce vague and shadowy claims.¹⁹ A pleading which seeks a specific performance is subject to a special demurrer, as being indefinite, ambiguous, and uncertain, if it does not allege how or when conveyance of title was to be made, or how the deferred payments were to be evidenced or secured, or what were the precise terms of an agreement as to the assumption of mortgages.²⁰

§ 6927. Contract must be complete.—Specific performance will not be decreed if it be doubtful whether an agreement has been concluded, especially if the party has done nothing under it.²¹ Courts of equity will not make contracts for parties, nor alter those which they have made, and where parties have made a contract for the sale of real estate, providing therein for forfeiture upon default, the court will not relieve the purchaser from the consequences thereof.²²

§ 6928. Contract must be mutual.—Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.²³ A contract to be obligatory on either party must be mutual and reciprocal.²⁴ Performance will not be decreed where only a part of the vendors are bound for the title, and there is a want

Paine, 1, Fed. Cas. No. 1725; Oakley v. Ballard, Hempst. 475, Fed. Cas. No. 10393.

¹⁸ Kendall v. Almy, 2 Sumn. 278, Fed. Cas. No. 7690; Agard v. Valencia, 39 Cal. 292; Easton v. Millington, 105 Cal. 49, 38 Pac. 509; Talmadge v. Arrowhead Reservoir Co., 101 Cal. 367, 35 Pac. 1000; Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40; Largey v. Leggat, 30 Mont. 148, 75 Pac. 950; Halsell v. Renfrow, 14 Okla. 674, 78 Pac. 118, 202 U. S. 287, 26 Sup. Ct. 610, 50 L. Ed. 1032.

¹⁹ Doe v. Culverwell, 35 Cal. 291. And see Wakeham v. Barker, 82 Cal. 46, 22 Pac. 1131.

²⁰ Smith v. Taylor, 82 Cal. 533,

23 Pac. 217.

²¹ Carr v. Duval, 14 Pet. 77, 10 L. Ed. 361.

²² Machold v. Farnan, 14 Idaho, 258, 94 Pac. 170.

²³ Cal. Civ. Code, § 3386.

²⁴ Doe v. Culverwell, 35 Cal. 291; Warren v. Costello, 109 Mo. 338, 32 Am. St. Rep. 669, 19 S. W. 29; Iron Age Co. v. Western Union Tel. Co., 83 Ala. 498, 3 Am. St. Rep. 758, 3 South. 449; Banbury v. Arnold, 91 Cal. 606, 27 Pac. 934; Smith v. Taylor, 82 Cal. 533, 23 Pac. 217; Easton v. Millington, 105 Cal. 49, 38 Pac. 509.

of mutuality.²⁵ But the contract becomes mutual by the act of filing the complaint where the action is brought against the one who signs the memorandum.²⁶ A partly performed oral contract to sell land is mutual, as both parties are reciprocally bound; ²⁷ and the same is true of an option partly performed.²⁸ Where the contract is intended to be mutual, if one is not bound, he cannot compel the performance of the other; but it is otherwise with unilateral contracts, such as bonds and optional contracts, where no obligation rests upon the option holder.²⁹ It is not necessary that the written agreement should be signed by the party seeking to enforce it. If the agreement is certain, fair, and just in all its parts, and signed by the party sought to be charged, that is sufficient; the want of mutuality is no objection to its enforcement.³⁰ It is of no consequence if the note or memorandum purports to be in the language of the vendor or the vendee, or both. If it purports to be in the language of the vendee, it is none the less a note or memorandum stating the names of the parties, and expressing the consideration. By subscribing such a note or memorandum, the vendor vouches for the truth of the facts therein stated, and, if need be, adopts it as his own. It thereupon ceases to be the separate statement of the vendee, and becomes the joint act of both. An *ex parte* or unilateral statement or proposition will not raise a contract; but such a memorandum is not such a unilateral statement, since it is but a statement of what has already transpired by one party, shown by him expressly, and by the other, by implication and assent to; by the latter, by the act of subscribing his name. It is a statement as evidence of a contract already made, and not a mere proposition to sell or buy;—a mere memorandum to satisfy the statute of frauds, and it is sufficient for that purpose, for it shows a sale and the parties to it, expresses the consid-

²⁵ *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Bronson v. Cahill*, 4 McLean, 19, Fed. Cas. No. 1926.

²⁶ See *Grant v. Johnson*, 5 N. Y. 247; *Joseph v. Holt*, 37 Cal. 250; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Coleman v. Upcot*, 5 Viner, 527; *Owen v. Davies*, 1 Ves. Sr. 82.

²⁷ *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

²⁸ *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Bird v. Potter*, 146 Cal. 286, 79 Pac. 970.

²⁹ *Frank v. Stanford-Hancock*, 13 Wyo. 37, 110 Am. St. Rep. 963, 77 Pac. 134, 67 L. R. A. 571.

³⁰ *Story's Equity Jurisprudence*, § 736; *In re Hunter*, 1 Edw. Ch. 1; *Wright v. Hart*, 17 Wend. 267; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300, 31 How. Pr. 38; *Vassault v. Edwards*, 43 Cal. 458; *Borel v. Mead*, 3 N. Mex. 84 (39), 2 Pac. 222.

eration, and is subscribed by both parties. If the language of the note should be, H. has purchased from J., it would include the statement of both a purchase by H. and a sale by J., since the expression, I (H.) have purchased from J., includes the equivalent expression, J. has sold to me (H.).³¹ A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance.³² In some jurisdictions optional contracts are declared to be specifically enforceable.³³ A bond to convey a mine, upon the payment of a certain sum of money, will be specifically enforced notwithstanding it is unilateral, and signed only by the party to be charged.³⁴

§ 6929. **Contract must be reasonable.**—Specific performance will not be enforced where the contract is unreasonable, or where from surprise it is inequitable to enforce its execution;³⁵ or where the contract is one of great hardship.³⁶ Mere excess of price over value,³⁷ or mere inadequacy of price, does not furnish cause for dismissal of the bill,³⁸ unless quite disproportionate to its value.³⁹

§ 6930. **Contract to release mortgage.**—A party who is entitled to a specific execution of an agreement to release the land from the lien of a mortgage may maintain a suit for that purpose, notwithstanding before the filing of the bill he had con-

31 *Joseph v. Holt*, 37 Cal. 250.
32 Cal. Civ. Code, § 3388. See, also, *Ballard v. Carr*, 48 Cal. 74.

33 *House v. Jackson*, 24 Or. 89, 32 Pac. 1027; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Watts v. Kellar*, 56 Fed. 1, 5 C. C. A. 394.

34 *Borel v. Mead*, 3 N. Mex. 84 (39), 2 Pac. 222.

35 Cal. Civ. Code, § 3391, subd. 2; *Bowen v. Waters*, 2 Paine, 1, Fed. Cas. No. 1725; *Thompson v. Tod*, 1 Pet. C. C. 380; Fed. Cas. No. 13978; *Surget v. Byers*, Hempst. 715, Fed. Cas. No. 13629; *Agard v. Valencia*, 39 Cal. 292.

36 *King v. Hamilton*, 4 Pet. 311,

7 L. Ed. 869; *Datz v. Phillips*, 137 Pa. St. 203, 21 Am. St. Rep. 864, 20 Atl. 426.

37 *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276; *Catheart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120; *Garnett v. Macom*, 2 Brock. Marsh. 185, Fed. Cas. No. 5245.

38 *Erwin v. Parham*, 12 How. 197, 13 L. Ed. 952. But see Civ. Code, § 3391, subd. 1. In what cases specific performance may be enforced, see *Pennsylvania Coal Co. v. Delaware etc. Canal Co.*, 31 N. Y. 91; *Bruck v. Tucker*, 42 Cal. 347.

39 *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

veyed away the land, such conveyance being with warranty.⁴⁰ An agreement that the holder of a second mortgage should foreclose his mortgage, and, if he should buy at the foreclosure, pay a sum on account of the first mortgage, may be enforced.⁴¹

§ 6931. Contract to transfer stock.—The agreement to transfer stock may be enforced where the contract to convey is clear, and the uncertain value of the stock renders it difficult to do justice by an award of damages.⁴²

§ 6932. Construction of contracts—Time.—It is impossible to prescribe any general and uniform rule by which the question whether the time within which an act is to be performed is of the essence of the agreement, but each case must be decided upon its own circumstances.⁴³ The general rule of equity is that time is not of the essence of the contract.⁴⁴ Thus, under an agreement for the sale of land, by which the purchase price was to be paid from "time to time, as the vendee earned it," time is not of the essence of the agreement, and a failure to make payments as the same were earned will not defeat the vendee's right to a specific performance when the vendor acquiesced in the delay.⁴⁵

§ 6933. Covenant to renew.—A court of equity can compel the specific performance of an absolute covenant to renew a lease, at a rent to be fixed by arbitrators.⁴⁶ On a lease from W. to H. was indorsed, "that at the expiration of the said term, H. shall have the privilege of purchasing the whole of said premises," at a fixed price. H. brought a bill demanding a marketable title. W.'s wife refused to join in the conveyance, but no

⁴⁰ *Malins v. Brown*, 4 N. Y. 403; *Bennett v. Abrams*, 41 Barb. 619.

⁴¹ *Livingston v. Painter*, 19 Abb. Pr. 28, 28 How. Pr. 517, 43 Barb. 270. See, also, *McLallen v. Jones*, 20 N. Y. 162.

⁴² *Phillips v. Berger*, 2 Barb. 609; 2 Story's Equity Jurisprudence, §§ 716, 718; *White v. Schuyler*, 1 Abb. Pr. (N. S.) 300, 31 How. Pr. 38; *Clark v. Flint*, 22 Pick. 231, 33 Am. Dec. 733; *Leach v. Forbes*, 11 Gray, 506, 71 Am. Dec. 732; *Todd v. Taft*, 7 Allen, 371.

⁴³ *Steele v. Branch*, 40 Cal. 4.

⁴⁴ See *Grey v. Tubbs*, 43 Cal. 359; *Vassault v. Edwards*, 43 Cal. 458; *Hearst v. Pujol*, 44 Cal. 230. See, also, Cal. Civ. Code, §§ 1490-1492, 1657.

⁴⁵ *Day v. Cohn*, 65 Cal. 508, 4 Pac. 511. As to when time is deemed of the essence of the contract, see *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280; *Requa v. Snow*, 76 Cal. 590, 18 Pac. 862.

⁴⁶ *Johnson v. Conger*, 14 Abb. Pr. 195.

collusion with her husband was shown. It was held that W. was not bound to indemnify H. against his wife's claim, and specific performance was refused.⁴⁷ Where a lease gives the lessee the privilege of purchasing the land on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion.⁴⁸

§ 6934. Demand.—It is held that a reasonable time must be given after a demand to prepare a deed, and by the allegation of a second demand the reasonable time may be shown.⁴⁹ But if the vendor on the first demand positively refuses, no further demand is necessary.⁵⁰ In an action for the specific performance of a trust, by the execution of a deed, a demand therefor before suit is only material as affecting costs.⁵¹ As a general rule, a demand is necessary before suit to enforce the specific performance of a contract to convey real estate; but where the contract has been repudiated, or performance refused, or notice given of a determination not to perform, a demand is not necessary.⁵²

§ 6935. Departure from contract.—Trivial departures from the contract will not affect the right to enforcement of a specific performance.⁵³

§ 6936. Grantor to prepare deed.—It is the duty of the grantor to prepare, execute, and deliver the deed; the grantee need do no more than tender the purchase money.⁵⁴

§ 6937. Gold and silver coin.—A contract to pay money in gold and silver coin cannot be specially enforced, nor can any other damages be recovered upon its breach, except interest.⁵⁵

⁴⁷ *Hawralty v. Warren*, 18 N. J. Eq. 124, 90 Am. Dec. 613.

⁴⁸ *Hitchcock v. Page*, 14 Cal. 440. See, as to effect of such a covenant, *De Rutte v. Muldrow*, 16 Cal. 505.

⁴⁹ *Lutweller v. Linnell*, 12 Barb. 512; *Connelly v. Pierce*, 7 Wend. 130; *Fuller v. Hubbard*, 6 Cow. 17, 16 Am. Dec. 423.

⁵⁰ *Carpenter v. Brown*, 6 Barb. 147; *Driggs v. Dwight*, 17 Wend. 74,

31 Am. Dec. 283. As to demand of conveyance, see *Lattin v. Hazard*, 85 Cal. 58, 24 Pac. 611.

⁵¹ *Jones v. City of Petaluma*, 36 Cal. 230.

⁵² *Burns v. Fox*, 113 Ind. 205, 14 N. E. 541.

⁵³ *Secombe v. Steele*, 20 How. 94, 15 L. E. 833.

⁵⁴ *Morgan v. Stearns*, 40 Cal. 434.

⁵⁵ *Wilson v. Morgan*, 1 Abb. Pr. (N. S.) 174, 30 How. Pr. 386.

So of an award to pay in gold coin.⁵⁶ The rule is different in California, if the memorandum provides for payment in gold and silver coin. Where a party who has executed a deed to lands to secure the performance of his agreement, not in writing, as to pay a certain sum of money in gold coin, and who seeks the aid of a court of equity to have the deed declared a mortgage, and to be permitted to redeem and have a conveyance of the land, ought to be held to a full compliance with the terms of the agreement as a condition precedent to the conveyance, and this by no construction of the specific contract act, but by the application of the maxim that "he who seeks equity should do equity."⁵⁷

§ 6938. **Imposing terms.**—When it would be unconscientious to enforce a specific performance according to the letter, it may be refused, unless the complainant will comply with certain modifications.⁵⁸

§ 6939. **Inability to make title.**—Where the vendor could not make a good title, he cannot enforce the specific performance of the contract by the vendee.⁵⁹ His ability to make title must be unquestionable;⁶⁰ and the title must be to all the lands embraced in the contract.⁶¹ But where there is simply a deficiency in quantity, a specific performance may be decreed, upon the principle of compensation.⁶² If defendant is unable, then plaintiff cannot have a complete specific performance.⁶³ A vendor agreeing to convey title free of incumbrance cannot force the vendee to take a title incumbered with a mortgage.⁶⁴

⁵⁶ *Howe v. Nickerson*, 14 Allen (Mass.), 400. See *Tufts v. Plymouth Gold Min. Co.*, 14 Allen (Mass.), 407.

⁵⁷ *Cowing v. Rogers*, 34 Cal. 648.

⁵⁸ *Mechanics' Bank of Alexandria v. Lynn*, 1 Pet. 376, 7 L. Ed. 185.

⁵⁹ *Stevenson v. Buxton*, 15 Abb. Pr. 352; *Morgan v. Morgan*, 2 Wheat. 290, 4 L. Ed. 242; *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 437; affirming 1 McLean, 290, Fed. Cas. No. 17295. See *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262; *Vought v. Williams*, 120 N. Y. 253,

17 Am. St. Rep. 634, 24 N. E. 195, 8 L. R. A. 591.

⁶⁰ *Garnett v. Macon*, 2 Brock. Marsh. 185, Fed. Cas. No. 5245.

⁶¹ *Hepburn v. Auld*, 5 Cranch, 262, 3 L. Ed. 96; *Sohier v. Williams*, 1 Curtis, 479, Fed. Cas. No. 13159.

⁶² *Hepburn v. Auld*, 5 Cranch, 262, 3 L. Ed. 96. As to where there is an excess of land, see *King v. Hamilton*, 4 Pet. 311, 7 L. Ed. 869.

⁶³ *Gregg v. Carey*, 4 Cal. App. 354, 88 Pac. 282.

⁶⁴ *Saxon v. White*, 21 Okla. 194, 95 Pac. 783.

§ 6940. **Jurisdiction.**—A bill *quia timet*, and to enforce the specific execution of an agreement, lies only where there is no adequate remedy at law. But where the damages resulting from a breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction unless there are some peculiar equitable circumstances.⁶⁵ The execution of a contract fairly and legally entered into is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform the agreement according to its terms and the manifest intention of the parties.⁶⁶ And the jurisdiction having once attached, the court will go on and do complete justice.⁶⁷ But a specific performance of a contract respecting a chattel will not be enforced in equity, unless it clearly appears that there is no adequate remedy at law.⁶⁸ The fact that in an action for the specific performance of a contract to convey land the complaint contains an alternative prayer for damages in case performance cannot be had will not deprive a court of equity of jurisdiction of the action.⁶⁹ Specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court.⁷⁰ Jurisdiction depends upon the question whether the breach admits of adequate compensation in damages. If non-performance will embarrass the plaintiff in his business plans, or involve him in a loss which a jury cannot estimate with any degree of certainty, specific performance should be decreed.⁷¹

§ 6941. **Land subject to trust.**—The owner of the equity of redemption of land took an assignment of the mortgage to himself, “trustee, and his heirs and assigns.” After his death, defendant agreed to buy the land of his heirs, upon the delivery of a good and sufficient deed, free from all incumbrances. It was held that without a discharge of the mortgage, or proof

⁶⁵ White v. Fratt, 13 Cal. 525.

⁶⁶ Hunt v. Rhodes, 1 Pet. 1, 7 L. Ed. 27.

⁶⁷ Cathcart v. Robinson, 5 Pet. 264, 8 L. Ed. 120; Clarke v. White, 12 Pet. 178, 9 L. Ed. 1046.

⁶⁸ Senter v. Davis, 38 Cal. 450; Roundtree v. McLain, Hempst. 245, Fed. Cas. No. 12084a. As to cases in which and upon what grounds a court

of equity will entertain a bill, see Tufts v. Tufts, 3 Woodb. & M. 456, Fed. Cas. No. 14233.

⁶⁹ Konnerup v. Frandsen, 8 Wash. 551, 36 Pac. 493; distinguishing Morgan v. Bell, 3 Wash. 554, 23 Pac. 925, 16 L. R. A. 614.

⁷⁰ Rourke v. McLaughlin, 38 Cal. 196.

⁷¹ Senter v. Davis, 38 Cal. 450.

that the land was not subject to a trust, the heirs could not compel specific performance.⁷²

§ 6942. **Limitations.**—In an action for specific performance, the plaintiff, after a decree in his favor which does not designate the time for the performance, may demand its enforcement at any time until the statute of limitations becomes available by his adversary.⁷³ The statutes of some states prescribe a method for securing specific performance of a decedent's contract by the executor;⁷⁴ and it is the duty of a purchaser of land to follow that procedure during the administration of the deceased vendor's estate, or be barred from thereafter suing for specific performance.⁷⁵

§ 6943. **Liquidation of damages not a bar.**—A contract otherwise proper to be specifically enforced may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same.⁷⁶ Thus a contract reserving to the vendor the privilege of foreclosing all the right of the vendee, in the case of his non-payment of the purchase price, may be specifically enforced. It is not necessary for the vendor to resort to the remedy of foreclosure.⁷⁷

§ 6944. **Memorandum must be in writing.**—The statute of frauds requires the contract, or some note or memorandum thereof, to be in writing, thus recognizing a difference between the contract itself and the written evidence which the statute requires.⁷⁸ A contract sought to be specifically enforced will be presumed to have been in writing, where the complaint is silent on such point, and no objection is raised by demurrer.⁷⁹ If the instrument be under the hand and seal of the one who is

⁷² *Sturtevant v. Jacques*, 14 Allen (Mass.), 523.

⁷³ *Redington v. Chase*, 34 Cal. 666.

⁷⁴ *Utah Rev. Stats.* 1898, §§ 3935-3940.

⁷⁵ *Free v. Little*, 31 Utah, 449, 88 Pac. 407.

⁷⁶ *Cal. Civ. Code*, § 3389; *Borel v. Mead*, 3 N. Mex. 84 (39), 2 Pac. 222.

⁷⁷ *Wood v. Mastick*, 2 Wash. T. 64, 3 Pac. 612.

⁷⁸ *Chitty on Contracts*, 69; *Joseph v. Holt*, 37 Cal. 250.

⁷⁹ *Mayger v. Cruse*, 5 Mont. 485, 6 Pac. 333. As to what is sufficient memorandum under the statute, see *Barry v. Coombe*, 1 Pet. 640, 7 L. Ed. 295; *Bissell v. Farmers' etc. Bank of Michigan*, 5 McLean, 495, Fed. Cas. No. 1446; *Ryan v. Davis*, 5 Mont. 505, 6 Pac. 339.

sought to be charged, equity will treat such agreements as specialties.⁸⁰ A deed properly executed and left with the attorney of the grantee is sufficient where the price has been paid.⁸¹ Specific performance of a parol contract was refused for want of clear, definite, and conclusive proofs of the contract, delivery and peaceful and uninterrupted possession, or valuable improvements made on the premises in question.⁸²

§ 6945. **Minor heirs.**—Where the vendor dies and the land descends to his heirs, some of whom are minors, the remedy of the purchaser is by applying to the court for an order of specific performance by the minors,⁸³ or the administrator or executor of the estate of the deceased.^{83a} A purchaser at an executor's sale of real estate under an order of court, who has paid the consideration, may compel the heirs of the deceased to make a title.⁸⁴

§ 6946. **Parol contract, when enforceable.**—A parol promise by the owner of land to give it to another, accompanied by actual possession thereof by him, will be enforced in equity by a decree of specific performance, when the promisee, induced by such promise, has made substantial improvements, and expended considerable money upon the premises, with the knowledge of the promisor.⁸⁵ And the improvements and expenditures may be very small compared with the prior improvements made by the owner in an endeavor to discover paying gold ore.⁸⁶ Taking possession and making improvements will support an oral contract.⁸⁷ K. entered into a parol contract to convey to L. a tract of land, upon the payment of a stipulated price therefor. L. paid the price as stipulated, and was let into possession. There-

⁸⁰ *Burton v. Smith*, 4 Wash. C. C. 522, Fed. Cas. No. 2219; *Davis v. Robert*, 89 Ala. 402, 18 Am. St. Rep. 126, 8 South. 114.

⁸¹ *Robbins v. Porter*, 12 Idaho, 738, 88 Pac. 86.

⁸² *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435.

⁸³ *Tompkins v. Hyatt*, 28 N. Y. 347; *Moore v. Burrows*, 34 Barb. 173.

^{83a} Cal. Code Civ. Proc. § 1582.

⁸⁴ *Piatt v. McCullough*, 1 McLean, 69, Fed. Cas. No. 11113.

⁸⁵ *Patterson v. Copeland*, 52 How. Pr. 460; *Williston v. Williston*, 41 Barb. 635; *Day v. Cohn*, 65 Cal. 508, 4 Pac. 511; *Meridian Oil Co. v. Dunham*, 5 Cal. App. 367, 90 Pac. 469; See *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Price v. Lloyd*, 31 Utah, 86, 86 Pac. 767; *Jomsland v. Wallace*, 39 Wash. 487, 81 Pac. 1094.

⁸⁶ *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.

⁸⁷ *McKay v. Calderwood*, 37 Wash. 194, 79 Pac. 629.

after K. brought ejectment to recover the possession of said land, to which action L. pleaded said contract, and its said part performance, and prayed judgment for its complete performance on the part of K. It was held that a judgment for L., as prayed, was properly rendered.⁸⁸ An oral agreement to enter into a written lease is not enforceable.⁸⁹ Statutes requiring real-estate brokers' contracts to sell land to be in writing involve only the right to commissions, and not the validity of the sale of the land.⁹⁰ On an oral exchange of lands, a conveyance by one on the faith of a conveyance from the other will support an action for specific performance in equity, though not a suit at law.⁹¹

§ 6947. Performance—Offer of, when must be shown.—The complainant must show that he has performed, or offered to perform, on his part the acts which formed the consideration on his part.⁹² One standing upon the other's laches must show himself ready, desirous, prompt, and eager to perform.⁹³ In Louisiana, neither party can compel the other to perform, unless he complies with the contract *in toto*.⁹⁴ The complaint must show that the defendant has the power or ability to perform on his part, and not leave his capacity in doubt, as the presumptions are always against the pleader, and all doubts are to be resolved against him. Where by the memorandum it appears that notes of third parties, dated two months before, were to be given in payment, but no averment of their existence or of their being in the possession or control of the purchaser at the time appears in the complaint, the defendant could not be decreed to perform, for that would involve an impossibility, since in such an action the plaintiff must make a case in which the defendant is *prima*

⁸⁸ King v. Meyer, 35 Cal. 646.

⁸⁹ Page v. Carnine, 29 Wash. 387, 69 Pac. 1093.

⁹⁰ Wash. Bal. Codes, § 4576, subd. 5; Pierce v. Wheeler, 44 Wash. 326, 87 Pac. 361.

⁹¹ Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154.

⁹² Denniston v. Coquillard, 5 McLean, 253, Fed. Cas. No. 3801; Colson v. Thompson, 2 Wheat. 336, 4 L. Ed. 253; Boone v. Missouri Iron Co., 17 How. 340, 15 L. Ed. 171; Mayger v. Cruse, 5 Mont. 485, 6 Pac.

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333; Datz v. Phillips, 137 Pa. St. 203, 21 Am. St. Rep. 864, 20 Atl. 426. That the fact that a contract depends upon a condition precedent which has not been performed is always a complete defense to a suit for its enforcement, see Boyes v. Green Mountain etc. Imp. Co., 3 Colo. App. 295, 33 Pac. 77.

⁹³ Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789; Livesley v. Johnston, 48 Or. 40, 84 Pac. 1044.

⁹⁴ Hyde v. Booraem, 16 Pet. 170, 10 L. Ed. 925.

facie able to perform.⁹⁵ Where a bill was filed against the provisional committee of a projected railroad company, for a specific performance of an agreement to deliver a certain number of certificates, there being no allegation that the defendant could deliver, but a statement from which the contrary might be inferred, the bill shows no capacity in the defendants to perform, and demurrer will be sustained.⁹⁶ For the purpose of enforcing a specific performance of stipulations, the consideration for which was an agreement to perform personal services, an offer to perform these services is not equivalent to an actual performance.⁹⁷ An offer of partial performance is of no effect.⁹⁸ It must be made in good faith, and in such manner as is most likely to benefit the creditor.⁹⁹ It must be free from conditions which the creditor is not bound to perform.¹⁰⁰ An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.¹⁰¹

§ 6948. **Parties.**—The parties plaintiff need not be interested to the same extent in the same land.¹⁰² Equity may decree a specific performance as against a party who would not be permitted to demand it himself.¹⁰³ A decree will not be made in favor of a bank which does not appear to have any interest in the subject, or that such bank still has an existence.¹⁰⁴ A vendor may have a decree for the specific performance of a contract as well as the vendee.¹⁰⁵ A sub-purchaser may be joined as a party at any time, if the actual posture of the other parties will not be changed.¹⁰⁶ In an action for specific performance to convey an undivided interest of a specified quantity of land in a large tract, all persons subject to plaintiff's equity, and

⁹⁵ *Joseph v. Holt*, 37 Cal. 250.

⁹⁶ *Columbine v. Chichester*, 2 Phil. 27.

⁹⁷ *Cooper v. Pena*, 21 Cal. 403.

⁹⁸ Cal. Civ. Code, § 1486.

⁹⁹ Cal. Civ. Code, § 1493.

¹⁰⁰ Cal. Civ. Code, § 1494.

¹⁰¹ Cal. Civ. Code, § 1495. See, generally, Cal. Civ. Code, §§ 1485-1515. As to performance, see Cal. Civ. Code, §§ 1473-1479. As to offer of performance, see *Hanson v. Slaven*, 98 Cal. 377, 33 Pac. 266; *Randol v. Tatum*, 98 Cal. 390, 33 Pac. 433;

Sheplar v. Green, 96 Cal. 218, 31 Pac. 42.

¹⁰² *Stewart v. Smith*, 6 Cal. App. 152, 91 Pac. 667.

¹⁰³ *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65.

¹⁰⁴ *Smith v. Pacific Bank*, 137 Cal. 363, 70 Pac. 184.

¹⁰⁵ *Catheart v. Robinson*, 5 Pet. 264, 8 L. Ed. 120; *Bronson v. Cahill*, 4 McLean, 19, Fed. Cas. No. 1926.

¹⁰⁶ *Taylor v. Longworth*, 14 Pet. 172, 10 L. Ed. 405. See Cal. Civ. Code, § 3395; *Ross v. Parks*, 93 Ala.

holding adversely to him, must be made parties.¹⁰⁷ If it affects only the residue of the estate, the administrator is not a necessary party;¹⁰⁸ or if he has no interest in the distribution of the estate.¹⁰⁹ The defendant must be personally served.¹¹⁰

§ 6949. **Parties—Husband and wife.**—Specific performance will lie against the wife of the contracting party, if it is community property which is involved, though she has not signed the contract;¹¹¹ but the action of the husband cannot bind the wife in reference to her separate property.¹¹² Failure of a husband to convey real estate to his wife in accordance with their oral antenuptial agreement, is such fraud as will take the case out of the statute of frauds and authorize specific performance.¹¹³ The complaint should negative the presumption of undue influence raised by section 2235 of the California Civil Code.¹¹⁴

§ 6950. **Parties—Partners.**—Specific performance may be had by one partner against another to compel conveyance of a half-interest in real property held in trust for such partner, according to agreement.¹¹⁵

§ 6951. **Pleading, what must contain.**—The complaint should state expressly, in direct terms, the facts constituting the cause of action, leaving no essential fact in doubt, or to be inferred or deduced by argument from the facts which are stated; and where the memorandum only raises an implication of the terms of the contract, as of the undertaking of the parties, the consideration, etc., and the complaint fails elsewhere to distinctly aver them, it is bad.¹¹⁶ Inference, argument, or hypothesis cannot be tolerated in a pleading.¹¹⁷ The rule which permits the

153, 30 Am. St. Rep. 47, 8 South. 363, 11 L. R. A. 148.

107 Agard v. Valencia, 39 Cal. 292. See further, as to parties, Butler v. Gage, 14 Colo. 125, 23 Pac. 462; Hubbard v. Johnson, 77 Me. 139; Corning v. Roosevelt, 25 Abb. N. C. 220; Towle v. Carmelo etc. Coal Co., 99 Cal. 397, 33 Pac. 1126.

108 McCabe v. Healy, 138 Cal. 81, 70 Pac. 1008.

109 Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667.

110 Silver Camp Min. Co. v. Dickert, 31 Mont. 488, 78 Pac. 967.

111 Young v. Porter, 27 Wash. 551, 68 Pac. 362.

112 Nason v. Lingle, 143 Cal. 363, 77 Pac. 71.

113 Allen v. Moore, 30 Colo. 307, 70 Pac. 682.

114 Stiles v. Cain, 134 Cal. 170, 66 Pac. 231.

115 Young v. Porter, 27 Wash. 551, 68 Pac. 362.

116 Joseph v. Holt, 37 Cal. 250.

117 Green v. Palmer, 15 Cal. 411, 76 Am. Dec. 492; Joseph v. Holt, 37 Cal. 250.

pleader to declare upon a contract *in hac verba* is limited to cases where the instrument set forth contains a formal contract. To extend the rule to mere notes or memoranda made as evidences of the terms of a contract sufficient to take it out of the statute of frauds would be to substitute inference and argument for facts.¹¹⁸ A complaint for specific performance need not allege defendant's ability to perform.¹¹⁹ The complaint must show the contract, including the consideration, date, terms, and stipulations.¹²⁰ An adequate consideration must be pleaded, and that the contract is just and reasonable.¹²¹ That damages for breach of the contract will not afford an adequate remedy should also be shown.¹²² Alleging that the consideration was not disproportionate to the value is sufficient.¹²³ In an action to compel defendant to execute a deed of real estate held by him, the complaint alleged that the property was purchased by plaintiff of one C., and, by agreement with the defendant, was conveyed directly to him as security for a debt, he to make a deed to plaintiff upon its payment, and that the debt was subsequently paid and the deed demanded; but the complaint failed to aver that defendant, upon the demand, refused, or at any other time had refused, to execute the deed. It was held that the failure to aver refusal was fatal to the action, and might be taken advantage of on the ground that the complaint does not state facts sufficient to constitute a cause of action.¹²⁴

§ 6952. **The same—Continued.**—In an action for specific performance of a contract, the complaint must set forth fully the nature and character of the consideration, and an allegation that the consideration was fair and reasonable is insufficient.¹²⁵ But a contract under seal is presumed to be for good consideration, and a bill for the specific performance of such contract is not demurrable because it does not show what the consideration was.¹²⁶ The complaint in such action need not allege that the plaintiff has no complete or adequate remedy at law in dam-

¹¹⁸ Joseph v. Holt, 37 Cal. 250.

¹¹⁹ Greenfield v. Carlton, 30 Ark. 547.

¹²⁰ Gaskins v. Peebles, 44 Tex. 390.

¹²¹ Cal. Civ. Code, § 3391; White v. Sagen, 149 Cal. 613, 87 Pac. 193; Herzog v. Atehison etc. Ry., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428.

¹²² Id.

¹²³ Kerr v. Moore, 6 Cal. App. 305, 92 Pac. 107.

¹²⁴ Dodge v. Clark, 17 Cal. 586.

¹²⁵ Mayger v. Cruse, 5 Mont. 485, 6 Pac. 333; Gates v. Lane, 44 Cal. 395.

¹²⁶ Borel v. Mead, 3 N. Mex. 84, (39), 2 Pac. 222.

ages.¹²⁷ And a complaint in such action which alleges that the defendant was the owner of the land at the time of the making of the contract for its sale is sufficient, without alleging that he was the owner at the time of the filing of the complaint.¹²⁸ It is not necessary for the plaintiff to allege citizenship in his complaint, where this is not a necessary fact to jurisdiction.¹²⁹ And an allegation that "the plaintiff has performed all and singular his agreements and covenants with the defendant" is sufficient as an averment of the performance of the conditions on his part to be performed.¹³⁰ Under the code of Colorado a formal bill for specific performance is not necessary. It is sufficient in this, as in all other civil actions, to state the facts of the case in plain and concise language, and to state the remedy demanded, and if the relief sought be warranted by the facts and the law, it will be awarded.¹³¹

§ 6953. The same—Joinder of causes of action.—When the alleged contract of which the specific performance is sought provides for a conveyance of certain real estate, and the payment of a certain sum of money in addition, in consideration of certain services of the plaintiff, a complaint seeking specific performance of the agreement to convey, and also a judgment for the sum of money agreed to be paid, is not demurrable for misjoinder of causes of action. The contract is an entirety, and must be enforced as such.¹³²

§ 6954. Compelling conveyance of legal title.—Where the successful claimant of the right to purchase certain public lands of the United States has acquired, pursuant to the judgment, the legal title affected with any fraud or trust in relation to it, he will be regarded in equity as a trustee of the true owner, who

¹²⁷ *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695. But see *Angus v. Robinson*, 62 Vt. 60, 19 Atl. 993.

¹²⁸ *Id.* See, as to sufficiency of averment of ownership, *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

¹²⁹ *Thompson v. Spray*, 72 Cal. 528, 14 Pac. 182; *Moritz v. Lavelle*, 77 Cal. 10, 11 Am. St. Rep. 229, 18 Pac. 803.

¹³⁰ *Id.*; *California Steam Nav. Co.*

v. Wright, 6 Cal. 258, 55 Am. Dec. 511.

¹³¹ *Gilpin County Mining Co. v. Drake*, 8 Colo. 586, 9 Pac. 787; *Ross v. Purse*, 17 Colo. 24, 28 Pac. 473. As to insufficient statement of facts to constitute a cause of action for specific performances, see *Freytag v. Northern Pac. R. R. Co.*, 1 Wash. 214, 23 Pac. 402.

¹³² *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206.

may by a proper proceeding compel a conveyance to himself of the legal title. In an action by the unsuccessful claimant to compel a conveyance of the legal title, the plaintiff must distinctly allege and clearly prove that he occupies such a *status* as gives him the right to control the legal title.¹³³

§ 6955. **The complaint.**—If a fiduciary relation exists between the parties, the complaint should negative the presumption of undue influence raised by section 2235 of the California Civil Code, and should show adequate consideration, even though the contract does not appear to be tainted with fraud, so as to justify its rescission.¹³⁴ Matters of defense, such as lack of ownership in defendant, need not be pleaded in the complaint, and a prior tender need not be pleaded if it appears that it would have been useless. Pleading breach of a contract to convey land raises the presumption of inadequate relief at law.¹³⁵ Plaintiff need not allege that the goods agreed to be sold by defendant are of the quality and quantity agreed upon, as defendant cannot object, and plaintiff by suing therefor accepts.¹³⁶

§ 6956. **Complaint to compel reconveyance—Averments.**—A complaint seeking to procure a decree compelling the defendants to reconvey to the plaintiff a certain city lot formerly conveyed by the plaintiff to the defendants by a deed absolute in form, and alleging that the plaintiff understood that the conveyance was given as security for a certain sum of money, and that she “never intended to make or execute a conveyance absolute to defendants, or to either of them, but was led to believe by them that such paper, purporting to be a deed as aforesaid, was simply a mortgage to secure the said payment,” is sufficient to support a decree adjudging that the conveyance was made to the defendants as security for certain moneys, and that the defendants reconvey the same upon the payment of the money due.¹³⁷ Where an agreement for specific performance is executed on one side by a conveyance, and it turns out that

¹³³ Plummer v. Brown, 70 Cal. 544, 12 Pac. 464.

¹³⁴ Stiles v. Cain, 134 Cal. 170, 66 Pac. 231.

¹³⁵ Christiansen v. Aldrich, 30 Mont. 446, 76 Pac. 1007; Hankel v.

Denison, 34 Wash. 51, 74 Pac. 822.

¹³⁶ Livesley v. Johnston, 45 Or. 30, 106 Am. St. Rep. 647, 76 Pac. 13, 946, 65 L. R. A. 783.

¹³⁷ Gumper v. Castagnetto, 97 Cal. 15, 31 Pac. 898.

for some reason the agreement cannot be enforced, the party conveying is entitled to a reconveyance, and therefore an averment relating to the conveyance tends to state a cause of action, and should not be stricken out.¹³⁸

§ 6957. **Memorandum of contract—Mutual mistake.**—A complaint for the specific performance of a contract to convey certain land which sets out a written memorandum thereof, indefinite and defective in the elements necessary to a perfect contract, and alleges that by mutual mistake of the parties thereto the contract agreed to, and which was intended to have been embodied in said writing, provided for the sale of "one acre, to be taken in a square form out of the northwest corner" of a certain lot, for which the buyer was to pay "one dollar in cash at this date, and ninety-nine dollars nine months from date," is sufficient on demurrer.¹³⁹ The remedy of specific performance must be mutual; and since a contract to construct and operate a railroad cannot be specifically enforced, a contract by defendant to convey a right of way in consideration thereof cannot be enforced.¹⁴⁰

§ 6958. **Failure of proof.**—A complaint which seeks to enforce the specific performance of a parol agreement for the delivery of a new policy of insurance, to ascertain the plaintiff's loss thereunder, and decree a recovery of the amount thereof, is not supported by testimony tending to show a renewal of a former policy.¹⁴¹

§ 6959. **Cross-complaint.**—A cross-complaint put in by defendant in a quiet-title action alleging that defendant improved the land by putting it out to orange-trees and caring for the same for three years, and making other improvements, upon verbal agreement to receive title to half of the land, and asking specific performance on part of plaintiff, is sufficient, without any allegations of value, or that the consideration was adequate.¹⁴² If

¹³⁸ Swain v. Burnette, 76 Cal. 299, 18 Pac. 394.

¹³⁹ Vail v. Tillman, 2 Wash. 476, 27 Pac. 76.

¹⁴⁰ Pacific El. Ry. Co. v. Campbell-Johnson, 153 Cal. 106, 94 Pac.

623; Leuschner v. Duff, 7 Cal. App. 721, 95 Pac. 914; Deitz v. Stephenson, 51 Or. 596, 95 Pac. 803.

¹⁴¹ Dodd v. Home Mut. Ins. Co., 22 Or. 3, 28 Pac. 881, 29 Pac. 3.

¹⁴² Fleishman v. Woods, 135 Cal. 256, 67 Pac. 276.

a trial is had upon the cross-complaint and answer thereto, the original complaint and answer thereto are not properly before the court, and cannot affect the defendant's right to a specific performance as pleaded in his cross-complaint.¹⁴³ A defendant in a specific-performance suit desiring a foreclosure of the contract for default, as on a mortgage, should plead and pray for the same in a cross-complaint.¹⁴⁴

§ 6960. Uncertainty of terms.—Specific performance will be denied if the contract is not certain as to the parties contracting, the terms of sale, and the description of the property.¹⁴⁵ The pleadings may help remove the uncertainty.¹⁴⁶ An agreement to convey one hundred acres "of the west end" of the land, it not appearing what land, is too indefinite;¹⁴⁷ but it is sufficient if the purchaser has taken possession of that amount.¹⁴⁸ A time specified, as ten days after passage of certain amendments agreed upon to certain ordinances, is sufficiently certain.¹⁴⁹ When a contract of sale provides for payment of part of the purchase money on mortgage, without specifying the terms of the mortgage, and the terms thereof are not made certain by reference in the contract, or by averment in the complaint, the agreement is too indefinite and uncertain to support a judgment for specific performance, and a demurrer to the complaint is properly sustained.¹⁵⁰ If payments are agreed to be made in land at a certain price or in cash, at option of one paying, and no land is described, it is too uncertain to be enforced.¹⁵¹

§ 6961. Relief—When granted—Nature of.—The specific performance is not a matter of right, but relief rests in the discretion of the court, and a delay of five days, where time may

¹⁴³ *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.

¹⁴⁴ *Johnston v. Mulcahy*, 4 Cal. App. 547, 88 Pac. 491.

¹⁴⁵ *Halsell v. Renfrow*, 14 Okla. 674, 78 Pac. 118; affirmed 202 U. S. 287, 26 Sup. Ct. 610, 50 L. Ed. 1032; *Powers v. Rude*, 14 Okla. 381, 79 Pac. 89.

¹⁴⁶ *Largey v. Leggat*, 30 Mont. 148, 75 Pac. 950.

¹⁴⁷ *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657.

¹⁴⁸ *Cobban v. Hecklen*, 27 Mont. 245, 70 Pac. 805.

¹⁴⁹ *Baumhoff v. Oklahoma Elec. etc. Co.*, 14 Okla. 127, 77 Pac. 40.

¹⁵⁰ *Burnett v. Kullak*, 76 Cal. 535, 18 Pac. 401.

¹⁵¹ *Meyer v. Quiggle*, 140 Cal. 495, 74 Pac. 40; *Los Angeles etc. Oil etc. Co. v. Occidental Oil Co.*, 144 Cal. 528, 78 Pac. 25.

be regarded as of the essence of the contract, may be deemed a bar to a specific performance.¹⁵² And the discretion of the court is governed for the most part by settled rules.¹⁵³ In cases of specific performance the purchaser is not compellable to accept a conveyance for only a part of the premises, except where they consist of different parcels purchased separately and having distinct prices.¹⁵⁴ Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or incumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation.¹⁵⁵ Under a bill which prays for the rescission of a contract specifically, and for general relief, chancery may decree a specific performance, if improper to rescind or modify.¹⁵⁶ Where the defendant is not able to perform the whole of the agreement, he may, at the option of the plaintiff, be compelled to perform it as far as he can, with compensation for the deficiency.¹⁵⁷

§ 6962. **Rents and profits.**—Although the claimant in a bill for the specific execution of a contract may not have specifically claimed in his bill a decree for rents and profits while in the possession of the defendant, he may claim it in the appellate court, under the prayer for general relief.¹⁵⁸ If the plaintiff has executed his side of an agreement to exchange lands by a conveyance, he is entitled, in an action to enforce the agreement, to

¹⁵² *Gale v. Archer*, 42 Barb. 320. See *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187, 24 Pac. 280.

¹⁵³ *Bowen v. Irish Presbyterian Congregation*, 6 Bosw. 245. See *Cohn v. Mitchell*, 115 Ill. 124, 3 N. E. 420; *Conger v. New York etc. R. R. Co.*, 120 N. Y. 29, 23 N. E. 983.

¹⁵⁴ *Perkins v. Washington Ins. Co.*, 6 Johns. Ch. 38; *Gibert v. Peteler*, 38 Barb. 488. As to the form of relief in a special case where the deed which the vendor had executed became void by his death, and his administratrix was substituted, and it was adjudged that the original plaintiff was entitled to a specific performance, see

Roome v. Phillips, 27 N. Y. 357. For a case where, on refusing to decree a specific performance, the complainant was not entitled to a decree for the sum to be paid on a rescission, see *Holt v. Rogers*, 8 Pet. 420, 8 L. Ed. 995.

¹⁵⁵ Cal. Civ. Code, § 3395.

¹⁵⁶ *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65.

¹⁵⁷ *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394; *Adams v. Messinger*, 147 Mass. 185, 9 Am. St. Rep. 679, 17 N. E. 491.

¹⁵⁸ *Watts v. Waddle*, 6 Pet. 389, 8 L. Ed. 4437; affirming 1 McLean, 200, Fed. Cas. No. 7295.

an account of rents and profits, and an averment relating thereto should not be stricken out.¹⁵⁹

§ 6963. **Tender.**—In a suit by vendee for specific performance of a contract of sale, the averment of tender of payment was in general terms, as that the tender had been repeatedly made, and that the plaintiff has been at all times, and still is, ready and willing to pay. It was held, that the tender should have been stated with greater particularity as to the time, but the objection in this respect cannot be taken for the first time in the supreme court.¹⁶⁰ Equity will not enforce the contract on showing that plaintiff has also violated it.¹⁶¹ The necessity of a tender before suit is waived by the defendant, where he has expressly repudiated the contract, or by his conduct has made performance unavailing.¹⁶² Tender is not necessary if it appears that it would be futile or impossible, and also that plaintiff has been and is ready, able, and willing to do and perform the part by him to be done.¹⁶³

§ 6964. **Tender—Objections to.**—The person to whom a tender is made must at the time specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.¹⁶⁴

§ 6965. **Time of performance.**—A reasonable time only can be allowed to a vendor to execute his part of the contract.¹⁶⁵ The time fixed for conveyance of the land is regarded at law as a material element in it, and if the vendor is not able to perform at the time, the purchaser may elect to consider the contract at an end; but equity will in certain cases carry the agreement into execution, although the time appointed has elapsed.¹⁶⁶ The

159 *Swain v. Burnette*, 76 Cal. 299, 18 Pac. 394.

160 *Duff v. Fisher*, 15 Cal. 375.

161 *Smith v. Krall*, 9 Idaho, 535, 75 Pac. 263.

162 *Sheplar v. Green*, 96 Cal. 218, 31 Pac. 42.

163 *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918.

164 Cal. Code Civ. Proc., § 2076. See, also, Cal. Civ. Code, § 1501; *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822.

165 *Bronson v. Cahill*, 4 McLean, 19, Fed. Cas. No. 1926; *Mason v. Wallace*, 4 McLean, 77, Fed. Cas. No. 9256.

166 *Bank of Columbia v. Hagner*, 1 Pet. 455, 7 L. Ed. 219.

pleader's statements as to time and tender will be closely construed against him.¹⁶⁷ The general rule of equity is that time is not of the essence of the contract.¹⁶⁸

§ 6966. **Time, when of the essence of the contract.**—If time is of the essence, a substantial compliance therewith must be made.¹⁶⁹ If there is an express agreement that time shall be of the essence of the contract, it is deemed strong but not conclusive evidence by courts of equity.¹⁷⁰ Except in cases where time has been made the essence of the contract for the sale of property, time is not treated by courts of equity as of the essence of the contract.¹⁷¹ There must be something in the contract indicating an intention that default in payment should work a forfeiture, to justify the supposition that time is of the essence of the contract.¹⁷² Where time is really material to the parties, the right to a specific performance may depend upon it.¹⁷³ If the equities remain unchanged, and the parties acted in good faith and with reasonable diligence, the court will not refuse specific performance for failure to tender or pay at the exact time fixed.¹⁷⁴ To make time the essence of the contract, it must appear that a punctual performance is a condition which will work forfeiture of the rights given unless rigorously fulfilled.¹⁷⁵ Something more than a mere stipulation that the money shall be paid, or the deed executed at a given time, is required.¹⁷⁶ If time is not of the essence, the time in which the purchaser in default

¹⁶⁷ *Nason v. Lingle*, 143 Cal. 363, 77 Pac. 71.

¹⁶⁸ *Brown v. Covillaud*, 6 Cal. 571; *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Ahl v. Johnson*, 20 How. 511, 15 L. Ed. 1005; *Hunter v. Town of Marlboro*, 2 Woodb. & M. 168, Fed. Cas. No. 6908; *Wells v. Wells*, 3 Ired. Eq. (N. C.) 596; *Runnels v. Jackson*, 1 How. (Miss.) 358. See Cal. Civ. Code, § 1492.

¹⁶⁹ *Roberts v. Braffett*, 33 Utah, 51, 92 Pac. 789; *Machold v. Farnan*, 14 Idaho, 258, 94 Pac. 170.

¹⁷⁰ 2 *Parsons on Contracts*, 543.

¹⁷¹ *Miller v. Steen*, 30 Cal. 407, 89 Am. Dec. 124; *Seton v. Slade*, 7 Ves. Jr. 265; *Alley v. Deschamps*, 13 Ves. Jr. 73, 225, 289; *Hipwell v. Knights*, 1 You. & Coll. 415; *Taylor v. Longworth*, 14 Pet. 175, 10 L. Ed.

405; *Hepburn v. Auld*, 5 Cranch, 262, 3 L. Ed. 96; *Gibbs v. Champion*, 3 Ham. (Ohio) 336; *De Camp v. Feay*, 5 Serg. & R. 323.

¹⁷² *Raymond v. Barnard*, 12 Johns. 276, 7 Am. Dec. 319. See *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748, 16 Pac. 465.

¹⁷³ *Garnet v. Macon*, 2 Brock. Marsh. 185, Fed. Cas. No. 5245; *Vint v. King*, 1 Am. Law Reg. 712.

¹⁷⁴ *Wright v. Astoria Co.*, 45 Or. 224, 77 Pac. 599.

¹⁷⁵ *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593; *Machold v. Farnan*, 14 Idaho, 258, 94 Pac. 170.

¹⁷⁶ *Id.*; *Viele v. Troy* etc. R. R. Co., 21 Barb. 381; *Jackson v. Ligon*, 3 Leigh. (Va.) 161, 187.

may have the further right to complete performance may be limited by the vendor, by giving reasonable notice that performance must be made by a certain time.¹⁷⁷

§ 6967. **Time—Effect of delay.**—A court of equity may at any time, as a matter of indulgence, decree a specific performance of an agreement, if the vendor is able to make a good title before the decree is pronounced.¹⁷⁸ Where delay has not changed the condition of the parties nor the value of the property, and the same justice can be done between the parties as when a conveyance was to have been executed, and there is an excuse for delay, a specific execution may be decreed.¹⁷⁹ So where the purchaser has entered into possession and improved the land, on payment of the money a specific performance will be decreed, notwithstanding the delay.¹⁸⁰ Where a party seeking specific performance of a contract to convey is in possession of the premises under an assertion of right, mere lapse of time is not prejudicial to his rights.¹⁸¹ Continued possession prevents the purchaser from rescinding the contract on the ground of non-performance on the day named.¹⁸² But possession taken by the purchaser is not a basis for a specific performance, if such possession has been surrendered by him before the commencement of the action.¹⁸³ The general principle appears to be perfectly established that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the parties; and it is incumbent on the plaintiff calling for a specific performance to show that he has used due diligence, or, if not, that his negligence arose from just cause, and has been acquiesced in.¹⁸⁴ The fact that a contract provides for one rate if payments are made at maturity, and another rate thereafter, and the vendor allows the amounts to remain unpaid after due, without settlement, the contract may be enforced in equity, as the parties have

¹⁷⁷ *Roberts v. Braffett*, 33 Utah, 51, 92 Pac. 789.

¹⁷⁸ *Hepburn v. Dunlop*, 1 Wheat. 179, 4 L. Ed. 65.

¹⁷⁹ *Longworth v. Taylor*, 1 McLean, 395, Fed. Cas. No. 8490; affirmed, 14 Pet. 172, 10 L. Ed. 405.

¹⁸⁰ *Mason v. Wallace*, 4 McLean, 77, Fed. Cas. No. 9256. See, also, *Kent v. Church*, 136 N. Y. 10, 32 Am.

St. Rep. 693, 32 N. E. 704, 18 L. R. A. 331.

¹⁸¹ *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424.

¹⁸² *Benson v. Tilton*, 24 How. Pr. 494.

¹⁸³ *Haight v. Child*, 34 Barb. 186.

¹⁸⁴ *Chase v. Hogan*, 3 Abb. Pr. (N. S.) 66; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744.

not considered time as an essence of the contract.¹⁸⁵ The fact that neither party performed nor offered to perform on the day fixed by the contract, and that the purchaser continued in possession some days after, shows that time was not considered by them as the essence of the contract.¹⁸⁶

§ 6968. **Time, when a bar.**—When the circumstances have so changed that the objects of the party against whom a performance is sought can no longer be equitably accomplished by a performance where the lapse of time has been very great, or where the value has materially changed, etc., the court will refuse to interfere.¹⁸⁷ A purchaser seeking the aid of a court of chancery to enforce specific performance must apply promptly.¹⁸⁸ When the vendor gives notice to the vendee, by serving him with a summons in ejectment, it is the vendee's duty to act promptly, by tendering payment and asserting his claim to the performance of the contract, or his equity will be lost.¹⁸⁹ In a certain case the court refused to interfere after a lapse of seven years.¹⁹⁰ Specific performance was refused where there were laches in the non-performance of the agreement.¹⁹¹ So of an award where there had been a long delay and laches, and a material change of circumstances and injury to the other party.¹⁹²

§ 6969. **Title.**—In a suit for specific performance, a purchaser will be forced to take a title which appears to the court of appeals to be good, though the judge of the court below was of a different opinion, that fact not being sufficient to constitute a doubtful title.¹⁹³ An agreement to make "a good and sufficient general warranty deed" of lands is an agreement to convey a good title in such lands.¹⁹⁴ An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to

¹⁸⁵ *Gumaer v. Draper*, 33 Colo. 122, 79 Pac. 1040.

¹⁸⁶ *Benson v. Tilton*, 24 How. Pr. 494.

¹⁸⁷ *Green v. Covillaud*, 10 Cal. 328, 70 Am. Dec. 725; *Pratt v. Law*, 9 Cranch, 456, 3 L. Ed. 791; *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Holt v. Rogers*, 8 Pet. 420, 8 L. Ed. 995; *Cooper v. Brown*, 2 McLean, 495, Fed. Cas. No. 3191; *Requa v. Snow*, 76 Cal. 590, 18 Pac. 862.

¹⁸⁸ *McWilliams v. Long*, 32 Barb. 194.

¹⁸⁹ *Tibbs v. Morris*, 44 Barb. 138.

¹⁹⁰ *Pratt v. Carroll*, 8 Cranch, 471, 3 L. Ed. 621.

¹⁹¹ *Boone v. Missouri Iron Co.*, 17 How. 340, 15 L. Ed. 171.

¹⁹² *McNeill v. Magee*, 5 Mason, 244, Fed. Cas. No. 8915.

¹⁹³ *Beioley v. Carter*, L. R., 4 Ch. 230.

¹⁹⁴ *Wellman's Exrs. v. Dismukes*, 42 Mo. 101.

the buyer a title free from reasonable doubt.¹⁹⁵ If the vendor cannot perform the entire agreement, and can convey an undivided half of the land, he may be compelled to convey that interest.¹⁹⁶ The owner of an undivided portion of a tract of land, having authorized his agent to sell part of it, and, after sale, if he acquires entire legal title, he holds the same for benefit of his vendee, and can enforce performance of the contract.¹⁹⁷ A purchaser who has rejected the title and refused part performance cannot have specific performance.¹⁹⁸

§ 6970. Valid tender of purchase money.—To constitute a valid tender, the party must have the money at hand, immediately under his control, and must then and there not only be ready and willing, but must produce and offer to pay it to the other party on the performance by him of the requisite condition.¹⁹⁹ An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to an actual production and tender of the money, instrument, or property.²⁰⁰ An offer of performance must be free from any conditions which the creditor is not bound on his part to perform.²⁰¹

§ 6971. Parties—Vendor and vendee as trustees.—The rule is well settled that where land is purchased for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the person paying the consideration, and the other party becomes his trustee; and it is now equally well settled that if one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*. The party setting up the trust must show that the money was paid by him at or before the execution of the conveyance.²⁰² The general principle is that, from the time of the contract for the sale of

¹⁹⁵ Cal. Civ. Code, § 3394; Turner v. McDonald, 76 Cal. 177, 9 Am. St. Rep. 189, 18 Pac. 262.

¹⁹⁶ Marshall v. Caldwell, 41 Cal. 611.

¹⁹⁷ Cobban v. Hecklen, 27 Mont. 245, 70 Pac. 805.

¹⁹⁸ Peters v. Van Horn, 37 Wash. 550, 79 Pac. 1110.

¹⁹⁹ Englander v. Rogers, 41 Cal. 420.

²⁰⁰ Cal. Code Civ. Proc., § 2074.

²⁰¹ Cal. Civ. Code, § 1494.

²⁰² Case v. Coddington, 38 Cal. 193; 2 Story's Equity Jurisprudence, § 1201; Will. Eq. 600; Bottsford v. Burr, 2 Johns. Ch. 405.

the land, the vendor, as to the land, becomes a trustee for the vendee, and the vendee, as to the purchase money, a trustee for the vendor, who has a lien upon the land therefor. And every subsequent purchaser from either, with notice, becomes subject to the same equities as the parties would be from whom he purchased. Courts of equity treat such contracts precisely as if they had been specifically executed. The vendee is treated in equity as the equitable owner of the land, and the vendor as the owner of the money.²⁰³

§ 6972. Verbal contract to give lease.—If the owner of land makes a verbal agreement with another to lease him the same for one year, with the privilege of two years more, at an annual rent of six hundred dollars, and a lease is to be executed containing the usual covenants, and the lessee takes possession and pays the rent for the first year, the agreement is sufficiently certain to support a decree against the lessor for a specific performance.²⁰⁴

§ 6973. What contract may be enforced.—A court of equity will decree a good and sufficient conveyance to be made upon payment of the purchase money, pursuant to a contract for the sale and conveyance of land.²⁰⁵ But this jurisdiction of equity must be exercised under a sound discretion, with an eye to the substantial justice of the case.²⁰⁶ And the relation of vendor and purchaser must exist between the parties.²⁰⁷ A vendee who has fulfilled his contract may obtain a decree for specific performance against parties who, with notice of his equities, succeeded to the interest of the vendor.²⁰⁸ A gift of land, having been partly executed, may be enforced by an action for specific performance.²⁰⁹ Lands held by no other tenure than

²⁰³ Willis v. Wozencraft, 22 Cal. 616. As to the distinction between an action for specific performance and an action to enforce a trust considered in reference to the effect of delay, see Tomlinson v. Miller, 3 Keyes, 517.

²⁰⁴ Clark v. Clark, 49 Cal. 586. See, also, Wallace v. Scoggin, 17 Or. 476, 21 Pac. 558.

²⁰⁵ Mechanics' Bank of Alexandria v. Seton, 1 Pet. 299, 7 L. Ed. 152; Murphy v. McVicker, 4 McLean, 252, Fed. Cas. No. 9951.

²⁰⁶ King v. Hamilton, 4 Pet. 311, 7 L. Ed. 869.

²⁰⁷ Walton v. Coulson, 1 McLean, 120, Fed. Cas. No. 17132.

²⁰⁸ Laverty v. Moore, 33 N. Y. 658. That the rules preventing the adjudgment of a specific performance of a contract in cases of fraud must state surprise and hardship, reviewed in Lynch v. Bischoff, 15 Abb. Pr. 357, note.

²⁰⁹ Freeman v. Freeman, 51 Barb. 306.

possession may be the legitimate subjects of control, and sometimes in equity chattel interests and personal property are made the subject of specific performance.²¹⁰

§ 6974. **What cannot be specifically enforced.**—The following obligations cannot be specifically enforced: 1. An obligation to render personal service; 2. An obligation to employ another in personal service; 3. An agreement to submit a controversy to arbitration; 4. An agreement to perform an act which the party has not power lawfully to perform when required to do so; 5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or 6. An agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable.²¹¹ A condition of a sale of a mine that employment would be furnished the seller cannot be specifically enforced, there being an adequate remedy at law for damages.²¹² Where any change of circumstances in regard to the property makes it unconscionable that the party should have execution of the contract, a court of equity will withhold its aid.²¹³ An agreement in settlement of a family dispute will not be enforced unless the agreement is complete and final.²¹⁴ Nor where there is substantial defect with respect to the nature, character, situation, extent, or quality of the estate, which was unknown to the purchaser, and in regard to which he was not put upon inquiry.²¹⁵ Nor when performance is obviously impossible; as where one who has already mortgaged his land contracted to convey it free of incumbrances, and the purchaser prayed specific performance, but would not waive the objection to the mortgage.²¹⁶ Nor the performance of continuous duties which involve personal labor and care; as the running of street-cars along a particular street daily "at such regular intervals as may be right and proper," whether the obligation of the railroad company rests on contract or the provisions of its charter.²¹⁷ The remedy in such case is

210 *Johnson v. Rickett*, 5 Cal. 218;
Senter v. Davis, 38 Cal. 450.

211 Cal. Civ. Code, § 3390.

212 *Mallory v. Globe-Boston Copper Min. Co.* (Ariz.), 94 Pac. 1116;
Deitz v. Stephenson, 51 Or. 596, 95 Pac. 803.

213 *Iglehart v. Vail*, 73 Ill. 63;
Thurston v. Arnold, 43 Iowa, 41.

214 *Wistar's Appeal*, 80 Pa. St. 484.

215 *Ellicott v. White*, 43 Md. 145.

216 *Snell v. Mitchell*, 65 Me. 48.

217 *McCann v. South etc. R. R. Co.*, 2 Tenn. Ch. 773. As to specific performance of contracts for personal services, see *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 18 Am. St. Rep. 278, 20 Atl. 467, 7 L. R. A. 779.

by *mandamus*, or by proceedings, in the name of the state, for a forfeiture of the charter.²¹⁸

§ 6975. What parties cannot be compelled to perform.—Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable; 3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or 4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced.²¹⁹

§ 6976. Who cannot have specific performance.—Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default.²²⁰ An execution creditor cannot enforce specific performance of a contract for sale of land purported to have been sold to him under execution, if the execution debtor had not the legal right to enforce the performance.²²¹ It will not be granted where no damage is suffered and no fraud inflicted.²²²

§ 6977. When action can be maintained.—The California Civil Code provides that except as otherwise provided in the article relating thereto, the specific performance of an obligation may be compelled.²²³ Specific performance will be decreed whenever the parties, or the subject-matter, or so much thereof

²¹⁸ *McCann v. Railroad Co.*, 2 Tenn. Ch. 773.

²¹⁹ Cal. Civ. Code, § 3391.

²²⁰ Cal. Civ. Code, § 3392. See, also, *Howard v. Throckmorton*, 48 Cal. 482; Cal. Civ. Code, § 1492.

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²²¹ *Costello v. Friedman*, 8 Ariz. 215, 71 Pac. 935.

²²² *Howes v. Barmon*, 11 Idaho, 64, 114 Am. St. Rep. 255, 81 Pac. 48, 69 L. R. A. 568.

²²³ Cal. Civ. Code, § 3384.

as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court. Thus specific performance of a contract for lands lying in America was decreed in England.²²⁴ So a trust in relation to lands lying in Ireland may be enforced in England, if the trustee live in England.²²⁵ It will lie if the subject of the trust or contract be within the jurisdiction, though the parties are not. So a bill for an allowance for the support of children out of the stocks in England was sustained, though the parties were out of the kingdom.²²⁶ So also in the case of a contract for the sale of lands lying in America, made by a citizen of New York, at Havana, with the defendant, a Spanish subject, jurisdiction was upheld in New York.²²⁷

§ 6978. **Performance and damages.**—In a suit for specific performance, the court having acquired jurisdiction may assess such damages as appear to have been sustained prior to the filing of the complaint as incidental to the remedy of specific performance.²²⁸ If there has been no change in value since conveyance was demanded, no damages therefor can be allowed.²²⁹

§ 6979. **Complaint—Essential allegations.**—The common-law rule as to what must be shown in the complaint and what must be proved, are—1. The contract must be shown, bearing no *jus deliberandi*, nor *locus penitentiæ*; 2. That the consideration has been tendered; 3. That there has been such a part performance that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law; 4. That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party.²³⁰

§ 6980. **Action, when lies—Averments.**—The existence of an adequate remedy by action for damages does not preclude the

²²⁴ Penn v. Lord Baltimore, 1 Ves. Sr. 444.

²²⁵ Kildare v. Eustace, 1 Vern. 419.

²²⁶ Anonymous, 1 Atk. 19.

²²⁷ Ward v. Arredondo, Hopk. Ch. 243. See, also, Arglasse v. Muschamp, 1 Vern. 75; Toller v. Carteret, 2 Vern. 494; Gardner v. Ogden, 22 N. Y. 327, 78 Am. Dec. 192; Newton v. Bronson,

13 N. Y. 587, 67 Am. Dec. 89; cited in Rourke v. McLaughlin, 38 Cal. 196.

²²⁸ West v. Washington etc. R. R. Co., 49 Or. 436, 90 Pac. 666.

²²⁹ Lindley v. Blumberg, 7 Cal. App. 140, 93 Pac. 894.

²³⁰ Hayes v. Kershow, 1 Sandf. Ch. 258. See, also, Cooner v. Chittenden, 33 Neb. 313, 50 N. W. 2.

vendor of lands from suing for specific performance.²³¹ A vendor of lands may recover the purchase money by a suit in equity for specific performance in every case where the vendee would have the right by such a suit to compel the execution and delivery of a deed by the vendor.²³² But where the defendant employed the plaintiff to negotiate a sale of certain described lands, and find a purchaser for the same, with a stipulation that if the said plaintiff should within ten days find a purchaser at a certain price per acre, that the defendant would sell and convey the same to such purchaser, and that plaintiff should have for his services all that should be obtained from such purchaser over said price per acre, it is not a contract for sale of land within the meaning of the statute of frauds, but is a mere contract of employment;²³³ and is revocable at any time.²³⁴ But it would seem that where a portion of the remuneration to be paid for such services should be a part of the land in question it would be otherwise. In that case, the contract being oral, and no note or memorandum having been reduced to writing or signed by either party thereto, that portion stipulating for the transfer of land to the plaintiff is null and void by the eighth section of the statute concerning fraudulent conveyances, and that portion of the contract being void, the remaining portion could not be enforced.²³⁵ That the plaintiff executed the agreement is not essential.²³⁶ But whether equity will enforce the specific performance of a contract depends not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law.²³⁷ And where W. agreed orally to buy of G. a designated machine, worth three hundred and seventy-five dollars, and directed G. to forward the same, by the New York Central railroad, to one S., it was held that the sale was complete, and taken out of the statute of frauds, by delivery to said railroad company, and specific performance decreed in favor of the

231 Fry on Specific Performance, 11; Crary v. Smith, 2 N. Y. 60; Schroepel v. Hopper, 40 Barb. 425. See, also, Duff v. Fisher, 15 Cal. 375.

232 Raymond v. San Gabriel etc. Water Co., 53 Fed. 883, 4 C. C. A. 89. See Greenfield v. Carlton, 30 Ark. 547.

233 Heyn v. Phillips, 37 Cal. 529.

234 Brown v. Pforr, 38 Cal. 550.

235 Lexington v. Clark, 2 Vent. 223; Crawford v. Morrell, 8 Johns. 255; cited in Fuller v. Reed, 38 Cal. 99; Cloud v. Greasley, 125 Ill. 313, 17 N. E. 826.

236 Clason v. Bailey, 14 Johns. 484; Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330.

237 Duff v. Fisher, 15 Cal. 375.

vendors.²³⁸ If there be a variance between the written agreement and the true agreement, the difference should be clearly shown.²³⁹

§ 6981. **Part performance—Plaintiff's title.**—A court will, under some circumstances, decree specific performance where there has been a part performance.²⁴⁰ The payment of part of the price is not such an act as that the rescission of the contract would be a fraud on the other party.²⁴¹ If the plaintiff's title is defective, and it appears before decree or report that it can be perfected, the delay is compensated by charging the complainant with interest.²⁴² A bill in equity which states as the complainant's title that he purchased under regular proceedings, and at an open and fair execution sale, a debt of two hundred and sixty thousand dollars for six hundred dollars is not bad on demurrer.²⁴³

§ 6982. **Rescission and offer to restore.**—Defense made upon a rescission by defendant must show also an offer to fully restore to the lessee and purchaser not only the purchase money paid, but improvements made upon strength of the contract.²⁴⁴

§ 6983. **Defense—Increased value.**—If a client contracts with his attorney to convey to him a portion of the property in litigation, in consideration of legal services, the fact that the property afterwards is largely enhanced in value is no objection to a decree for specific performance, even though such enhancement is in a material degree the result of the labor and money of the client.²⁴⁵

§ 6984. **Insurance policy.**—If on a bill in equity for specific performance of a contract, for a policy of insurance, the answer

²³⁸ *Glen v. Whitaker*, 51 Barb. 451.

²³⁹ *Coles v. Browne*, 10 Paige, 526.

²⁴⁰ *Brashier v. Gratz*, 6 Wheat. 528, 5 L. Ed. 322; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810, 28 N. W. 744.

²⁴¹ *Story's Equity Jurisprudence*, §§ 760, 761; *Sugden on Vendors*, 112, § 3; *Ex parte Storer, Davies*, 294, Fed. Cas. No. 13490; *Haight v. Child*, 34 Barb. 186; *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435.

²⁴² *Clute v. Robison*, 2 Johns. 595; *Pierce v. Nichols*, 1 Paige, 244; *Reformed Dutch Church v. Mott*, 7 Paige, 77, 32 Am. Dec. 613; *Viele v. Troy etc. R. R. Co.*, 21 Barb. 381; affirmed, 20 N. Y. 184; *Cleveland v. Burrill*, 25 Barb. 532.

²⁴³ *Erwin v. Parham*, 12 How. 197, 13 L. Ed. 952.

²⁴⁴ *Swanston v. Clark*, 153 Cal. 300, 95 Pac. 1117.

²⁴⁵ *Howard v. Throckmorton*, 48 Cal. 482.

admits that a proposal for acceptance was made and accepted, but adds that no contract was made, the court will not intend that this denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequence of the facts admitted.²⁴⁶

§ 6985. **Statute of frauds.**—A general demurrer interposed as a plea of the statute of frauds to a bill for specific performance must be overruled where the facts stated in the bill are not inconsistent with the signing of the contract, and the bill expressly alleges a part performance.²⁴⁷ Where the answer admits an agreement, the defendant must plead the statute, or he is taken to have admitted the agreement, which is either good under the statute, or on some other ground binding upon him.²⁴⁸ And, notwithstanding his admission, the defendant is entitled to the full benefit of the statute.²⁴⁹ But the answer, with the admission, must be to the original bill.²⁵⁰ And the answer must distinctly claim the benefit of the statute.²⁵¹ The statute of frauds is waived by the defendant unless specially pleaded as a defense.²⁵²

§ 6986. **Marriage.**—When a married woman has, prior to her marriage, entered into a contract which is binding upon her, a specific performance may be decreed, notwithstanding her subsequent marriage.²⁵³

§ 6987. **Objection to deed.**—Where, in pursuance of an agreement to convey real estate, the grantee presents a deed different from that called for in the contract, the grantor must make his objections at the time it is presented, or within a reasonable time afterwards, or when the possession is demanded. He can-

²⁴⁶ *Union Mut. Ins. Co. v. Commercial Mut. M. Ins. Co.*, 2 Curtis, 524, Fed. Cas. No. 14372, 8 L. R. (N. S.) 610.

²⁴⁷ *Field v. Hutchinson*, 1 Beav. 599; *Child v. Godolphin*, 1 Dick. 39.

²⁴⁸ *Cruyston v. Banes*, Prec. Ch. 208; *Symondson v. Tweed*, Prec. Ch. 734.

²⁴⁹ *Rowe v. Teed*, 15 Ves. 375; *Blagden v. Bradbear*, 12 Ves. 466. See, contra, *Mussell v. Cooke*, Prec. Ch. 533.

²⁵⁰ *Spurrier v. Fitzgerald*, 6 Ves. 548; *Beatson v. Nicholson*, 6 Jur. 621.

²⁵¹ *Skinner v. M'Douall*, 2 De G. & Sm. 265.

²⁵² *Porter v. Wormser*, 94 N. Y. 450; *Wells v. Monihan*, 129 N. Y. 161, 29 N. E. 232; *Crane v. Powell*, 139 N. Y. 379, 34 N. E. 911; *Farwell v. Tillson*, 76 Me. 227; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819.

²⁵³ *Love v. Watkins*, 40 Cal. 547, 6 Am. Rep. 624.

not be permitted to avail himself of it for the first time as a defense when sued for breach of covenant.²⁵⁴

§ 6988. **Reconveyance of property.**—If the grantee of land agree by parol with the grantor that he may keep the land and work it one year, and at the end of the year make his election whether he will keep it and pay the purchase money or restore it to the grantor, the grantee is in time to avoid payment of the purchase money if on the first day after the end of the year he notifies the grantor of his election, and tenders him or his agent a deed of the property.²⁵⁵

§ 6989. **Defense of impracticability.**—Specific performance will not be denied on the ground that it is impracticable to compel performance,²⁵⁶ but will be denied if performance of the contract will be detrimental to the interests of the public, or will work great hardship on defendant and little good to plaintiff.²⁵⁷

§ 6990. **Proof.**—The question of an implied trust which is not presented by the pleadings or the evidence cannot be considered.²⁵⁸ The party seeking specific performance has the burden of proving by a preponderance of the evidence.²⁵⁹ A parol agreement must be clearly proved.²⁶⁰

§ 6991. **Discretion of the court.**—Enforcement of a contract is largely a matter of discretion of the court,²⁶¹ but it must be a sound legal discretion.²⁶²

§ 6992. **Decree.**—A vendee attempting to enforce conveyance upon reduced price, on account of misrepresentation of vendor as to the number of acres, not pleading a claim for taxes paid, cannot have a decree for such taxes.²⁶³ It is error to add, over plaintiff's objection, an alternative money judgment for the value

²⁵⁴ Morgan v. Stearns, 40 Cal. 434.

²⁵⁵ Rhine v. Ellen, 36 Cal. 362.

²⁵⁶ Lane v. Pacific etc. Ry., 8 Idaho, 230, 67 Pac. 656.

²⁵⁷ Herzog v. Atchison etc. Ry. Co., 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428.

²⁵⁸ People Min. etc. Co. v. Central Consol. Min. Co., 20 Colo. App. 561, 80 Pac. 479.

²⁵⁹ Hagerman v. Bates, 30 Colo. 89, 69 Pac. 526.

²⁶⁰ Deeds v. Stephens, 10 Idaho, 332, 79 Pac. 77.

²⁶¹ Roberts v. Braffett, 33 Utah, 51, 92 Pac. 789.

²⁶² Stevens v. Trafton, 36 Mont. 520, 93 Pac. 810.

²⁶³ Quarg v. Scher, 136 Cal. 406, 69 Pac. 96.

of stock sought to be recovered by plaintiff.²⁶⁴ Any damages properly pleaded and proven should be assessed.²⁶⁵ Failure to find the value of the land is ground for reversal.²⁶⁶ The enforcement of a contract for the sale of land may be enforced by levy upon and sale of any of defendant's property, as on execution.²⁶⁷ A decree will not be rendered against joint owners unless all of them were parties to the contract.²⁶⁸ Conditions precedent should be included in the decree,²⁶⁹ and a definite time within which performance shall be accomplished.²⁷⁰

FORMS IN SPECIFIC PERFORMANCE.

§ 6993. Complaint by purchaser against vendor.

Form No. 1846.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant was, on or before the . . . day of . . . , 19.., seised and possessed of a certain tract of land, situated in . . . , and bounded and described as follows, to-wit: [Describe land.]

II. That on said day the plaintiff and said defendant entered into a written contract of lease, whereby said defendant did grant, demise, and to farm let said tract of land to this plaintiff for the term of . . . years thereafter, to be fully completed and ended, in consideration of the sum of . . . dollars, monthly rent of said premises, to be paid therefor by the plaintiff to said defendant.

III. That in and by said contract of lease, and as a part thereof, it was further covenanted and agreed that the plaintiff should have the privilege of purchasing said lot or tract of land, on or before the expiration of said lease, for the sum of . . . dollars, in gold coin of the United States, which said covenant or agreement in said lease contained, and as part thereof as aforesaid, is as follows: [Insert copy of covenant.]

²⁶⁴ Fanny Rawlings Min. Co. v. Tribe, 29 Colo. 302, 68 Pac. 284.

²⁶⁵ Deeds v. Stephens, 8 Idaho, 514, 69 Pac. 534.

²⁶⁶ White v. Sage, 149 Cal. 613, 87 Pac. 193.

²⁶⁷ Anderson v. Wallace Lumber etc. Co., 30 Wash. 147, 70 Pac. 247.

²⁶⁸ Gault Lumber Co. v. Pyles, 19 Okla. 445, 92 Pac. 175.

²⁶⁹ Olympia Min. Co. v. Kerns, 13 Idaho, 514, 91 Pac. 92.

²⁷⁰ Lawrence v. Halverson, 41 Wash. 534, 83 Pac. 889; Freeburg v. Lamoureaux, 15 Wyo. 22, 85 Pac. 1054.

IV. That the plaintiff, upon the execution and delivery of said lease, entered into and was in the sole possession thereof up to the present time, and is now in possession thereof, and during said time he has made valuable improvements thereon, to-wit, to the value of . . . dollars.

V. And the plaintiff further alleges, that he duly performed all the conditions of said lease on his part to be performed, and on the . . . day of . . . , 19 . . . , which day was previous to the expiration of said lease, the plaintiff tendered to said defendant the sum of . . . dollars, in gold coin of the United States, and demanded from him a conveyance of said premises, and requested him specifically to perform his said covenant or agreement to convey to him said tract or lot of land, but that he refused and ever since has refused, and still refuses so to do.

VI. And plaintiff avers that ever since said tender made as aforesaid, to-wit, on the . . . day of . . . , 19 . . . , he has remained and still is ready and willing to pay to the defendant the said sum of . . . dollars in gold coin aforesaid, and now brings the same into this court for that purpose and has always been and now is ready and willing to receive a conveyance of said premises.

VII. And plaintiff avers that by reason of the breach of the covenant to convey on the part of the defendant hereinbefore set out, and of his failure to specifically perform the same, plaintiff has suffered damages in the sum of . . . dollars.

Wherefore, the plaintiff demands judgment:

1. That the said covenant so made between the plaintiff and defendant hereinbefore set out, may be specifically performed, and that said defendant be adjudged to sell and convey the said premises to the plaintiff, and to execute a good and sufficient deed thereof to him, on payment by the said plaintiff of the amount of the purchase money aforesaid.

2. That the said defendant be adjudged to account and pay to the plaintiff the damages he has sustained in such event, to-wit, the sum of . . . dollars, or for such other or further relief as to the court may seem just.

§ 6994. The same—Short form.

Form No. 1847.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the defendant was seised in fee simple of certain real property, described in the agreement hereinafter mentioned.

II. That on the same day the plaintiff and defendant entered into an agreement under their hands and seals, whereby the plaintiff agreed to buy, and defendant agreed to sell, the property described in the agreement, of which the following is a copy: [Copy agreement.]

III. That on the . . . day of . . . , 19 . . . , the plaintiff tendered . . . dollars to the defendant, and demanded a conveyance of the said property. [If other conditions were imposed upon plaintiff, aver performance, or offer to perform.]

IV. That the defendant has not executed such conveyance.

V. That the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

Wherefore, plaintiff demands judgment:

I. That the defendant execute to the plaintiff a sufficient conveyance of the said property [following the terms of the agreement].

2. For . . . dollars damage, for withholding the same.

§ 6995. Complaint by purchaser against executor or administrator of vendor.

Form No. 1848.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , one John Doe was the owner of that certain tract of land, situated in . . . , and bounded and described as follows: [Describe land.]

II. That on said day the said John Doe made, executed and delivered to plaintiff an instrument in writing for the sale of said land, of which the following is a copy: [Set out agreement.]

III. That the sum of . . . dollars, as set forth and mentioned in said instrument, was and is a just, fair, and adequate consideration and price for the land therein described.

IV. That, under and by virtue of said agreement, and with the knowledge and consent of said John Doe, plaintiff entered into the possession of said land, and made valuable improvements thereon, aggregating in value the sum of . . . dollars; and that ever since the . . . day of . . . , 19 . . . , the plaintiff has been and is now in the actual possession of said land and improvements.

V. [Allege death of vendor, and the appointment of the defendant administrator or executor.]

VI. That, at the time of the death of said John Doe, the purchase money for the said land had not become due or payable under the terms of said instrument.

VII. That on the . . . day of . . . , 19 . . . , the plaintiff tendered to said administrator [or, executor] the full amount of the purchase price for said land, and demanded of him the execution and delivery to plaintiff of a good and sufficient deed to said land, but that said administrator [or, executor] declined and refused, and still does decline and refuse so to do.

VIII. That on the . . . day of . . . , 19 . . . , and while proceedings were pending in the superior court of . . . county, for the settlement of the estate of said John Doe, deceased, plaintiff filed in and presented to said superior court his verified petition for an order of said court, authorizing and requiring said administrator [or, executor] to execute a conveyance of said land to plaintiff, in accordance with the terms of said written instrument.

IX. That thereafter, on the . . . day of . . . , 19 . . . , the said petition came on for hearing by said superior court, and thereafter, on the . . . day of . . . , 19 . . . , the said court rendered its decision, and did then and there dismiss without prejudice plaintiff's said petition and all proceedings thereunder.

X. That the defendant Mary Doe is a widow, and the defendants James Doe and Charles Doe are the children of the said John Doe, deceased, and are, as plaintiff is informed and believes, necessary parties to a full determination of the matters herein set forth.

XI. That the plaintiff has performed all the terms and conditions of said agreement on his part, and has been always ready and willing to pay said purchase price, and is now ready and willing, upon the order of this court, to pay into court the amount due to the estate of John Doe, deceased, therefor, upon the execution and delivery by defendants of a good and sufficient deed of said land.

Wherefore, plaintiff prays, that on the payment of the amount due as the purchase money of the said piece and parcel of land, or the deposit of said amount in court by plaintiff, defendants be directed and required to make, execute, and deliver to plaintiff a good and sufficient deed of the same; and that in the event of their neglect or failure so to do within a time to be fixed

by the court, then that the clerk thereof, acting in the capacity of a master in chancery, be appointed, authorized, and directed by the court to make, execute, and deliver said deed to plaintiff.

§ 6996. Complaint—Where money lay idle.

Form No. 1849.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the . . . day of . . . , 19 . . . , at . . . , was the owner in fee of the premises hereinafter described, and that he then entered into an agreement with the plaintiff, executed under their hands and seals, whereby plaintiff agreed to buy and defendant agreed to sell the property described therein; of which agreement the following is a copy: [Copy of the agreement.]

II. That the plaintiff has duly performed all the conditions of said agreement on his part.

III. That on the . . . day of . . . , 19 . . . , at . . . , the plaintiff tendered to defendant said sum of . . . dollars, and requested a conveyance of said premises according to the terms of said agreement; but the defendant then and ever since has refused to execute and deliver such conveyance.

IV. That the plaintiff, ever since the time of said tender, has kept said money so tendered on deposit and unproductive, and ready to be paid over on said agreement, and into this court.

Wherefore, plaintiff demands judgment:

1. That the defendant execute to the plaintiff a sufficient conveyance of the said property.

2. For . . . dollars damages for withholding the same.

3. For interest on plaintiff's purchase money which has lain idle from the date when said conveyance should have been made.

§ 6997. Allegation where there is deficiency of land.

Form No. 1850.

That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said . . . , and that the same does not contain . . . acres, but only . . . acres.

Wherefore plaintiff demands judgment:

1. That a just deduction from the purchase money be made

on account of said deficiency, and that on payment of the residue of said purchase money, the defendant execute to the plaintiff a sufficient conveyance of the said property.

2. For . . . dollars damages, for withholding the same.

§ 6998. Allegation where there is outstanding incumbrance.

Form No. 1851.

That the defendant's title to the premises is incumbered by a mortgage to one A. B. for . . . dollars, with interest [terms of payment], which mortgage is not payable until the . . . day of . . . , 19 . . .

§ 6999. Complaint—On an exchange of property.

Form No. 1852.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , at . . . , the plaintiff and defendant entered into an agreement in writing, dated on that day, whereby, in consideration of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the . . . day of . . . , 19 . . . , convey to the plaintiff in fee a lot of land, situated in the town of . . . , county of . . . , in the state of . . . , and described as follows: [Description of premises.] In consideration whereof, the plaintiff covenanted in and by said agreement to convey to the defendant in fee a house and lot situate in the city of San Francisco, in this state. [Describe it.]

II. That the plaintiff performed all the conditions of said contract on his part, and on the . . . day of . . . , 19 . . . , at . . . , tendered to the defendant a warranty deed of said premises, signed and sealed by the plaintiff, and demanded of him a deed of said premises in . . . , but the defendant refused to execute and deliver such a deed to the plaintiff.

III. That on the . . . day of . . . , 19 . . . , in pursuance of said agreement, the plaintiff delivered and the defendant took possession of the premises so to be conveyed to the defendant, and that he still occupies the same.

Wherefore, plaintiff demands judgment:

That the defendant convey to the plaintiff said lot in . . . , pursuant to the contract, and for the costs of this action.

§ 7000. Complaint—Vendor against purchaser.

Form No. 1853.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the plaintiff was seised in fee of certain property hereinafter described.

II. That on the same day the plaintiff and defendant entered into an agreement, under their hands and seals, whereby plaintiff agreed to sell, and defendant agreed to buy, the land described in said agreement, a copy of which is hereto annexed and made a part of this complaint, marked "Exhibit A."

III. That on the . . . day of . . . , 19 . . . , at . . . , the plaintiff tendered to the defendant a deed of the premises, pursuant to the agreement, but the defendant then, and ever since, refused to accept the same, and to pay the amount of purchase money specified in said agreement [or otherwise, according to the terms of sale].

IV. That the plaintiff was, and has always been, and still is, ready and willing to perform the agreement on his part.

Wherefore, the plaintiff demands judgment:

1. That the defendant perform said agreement, and pay to the plaintiff . . . dollars, the remainder of said purchase money, with interest from the . . . day of . . . , 19 . . .

[Annex "Exhibit A."]

§ 7001. Complaint against railroad company for specific performance of agreement to construct farm-crossing, and for damages.

Form No. 1854.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant, on the . . . day of . . . , 19 . . . , had located its railroad, in part, upon the farm of the plaintiff, on which he lives, in said county of . . . , and on said day he agreed with it, by a writing, signed by both parties, to sell and convey to it the right of way across said farm for its railroad, for . . . dollars, provided that, in case the construction of said railroad should require a fill across a certain meadow, on said farm, then a farm-crossing should be made and left, either over said embankment or through the same, and under the tracks.

II. That on the . . . day of . . . , 19 . . . , the plaintiff re-

ceived from the defendant the said . . . dollars, and executed and delivered to it a deed of said right of way, containing no reference to any agreement as to a farm-crossing, which deed was recorded on the . . . day of . . . , 19 . . . , in the office of the county recorder of . . . county, in book . . . of deeds at page . . . thereof.

III. That on or about the . . . day of . . . , 19 . . . , the defendant constructed its railroad across said farm, and made a fill across said meadow, fifteen feet high, but left no farm-crossing either over or through the embankment thus constructed.

IV. That the plaintiff, on said day, requested the defendant to make or leave such a crossing, but the defendant, through John Doe, its superintendent, refused so to do.

V. That for want of such a crossing, the plaintiff has ever since said day been forced to drive his cattle daily, in going from his barn to the main part of his farm, around the side of said valley, and a half mile out of the direct and accustomed way, whereby he has been damaged to the amount of . . . dollars.

VI. That unless a crossing is constructed as agreed, the plaintiff's farm cannot be conveniently used as such, and will be irreparably injured.

Wherefore, the plaintiff prays for a judgment for the immediate construction of a proper farm-crossing, as agreed, and for damages in the sum of . . . dollars.

§ 7002. Complaint by purchaser against vendor, claiming interest on purchase money which has lain idle, and deduction for deficiency and for outstanding incumbrance.

Form No. 1855.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the defendant, being owner in fee [or otherwise], and possessed of certain real property hereinafter described, and desirous to dispose of the same, made, [by one M. N., his agent, duly authorized thereto,] an agreement in writing with the plaintiff, of which a copy is attached hereto, made a part of this complaint, and marked "Exhibit A." [Or set forth agreement made according to its legal effect.]

[II. That on the execution thereof the plaintiff paid to the defendant . . . dollars as a part payment of the purchase money therein mentioned.]

[III. That afterwards, by mutual agreement between the plaintiff and the defendant, the time for completing said contract was extended to the . . . day of . . . , 19 . . .]

IV. That the plaintiff duly performed all of the conditions thereof on his part, and has always been ready and willing, and still is, to fulfill the agreement on his part; and, on having good and marketable title made of said premises, and a conveyance of the fee thereof, free from all incumbrances [or otherwise, according to the contract], to pay the residue of the purchase money to the defendant [and to give the bond and mortgage agreed].

V. That on the last day mentioned, at . . . , the plaintiff duly tendered to the defendant said sum of . . . dollars, and requested such a conveyance [and offered to give the bond and mortgage agreed for, on receiving the same], but the defendant refused, and still refuses, to execute or deliver such conveyance.

VI. [Where purchase money lay idle:] That . . . dollars, the residue of said purchase money, has been ready and unproductive in the hands of the plaintiff, for completing the purchase, ever since the said day on which it ought to have been completed.

VII. [Where there is a deficiency:] That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said . . . , and that the same does not contain . . . acres, but only . . . acres.

VIII. [Where a claim of right of way proved to be unfounded:] That at the time of treating for said contract said [defendant, or agent] represented to the plaintiff that there belonged to the said estate a right of way from the said estate to . . . street, and that the said [defendant] could make a good title in fee to the said right of way, which said right of way rendered the said estate very convenient for the business which the plaintiff intended to carry on upon the said premises; and that before the agreement of the said . . . day of . . . , 19 . . . , was signed, a certain plan made for the purpose of showing how buildings might be erected on the said estate, was shown to the plaintiff by the said [defendant, or agent] and upon that building-plan the said right of way was delineated; and by the same building-plan, and the representations of the said [defendant, or agent], the plaintiff was led to expect that he should have a right of way directly from the said estate to . . . street, and the expectation of having such right of way was a great inducement to plaintiff to purchase the said estate, and when the said agreement was signed the said building-

plan was delivered to the plaintiff, and the same is now in the plaintiff's possession; but since the signing of the said agreement one [an adverse claimant] has claimed to be exclusively entitled to the said right of way, and she brought an action in the . . . court for the recovery of the possession thereof, and in that action she obtained a verdict, and she has recovered possession of the said road or way from the said estate to . . . street, and she has since sold the same, and that the plaintiff is now prohibited from using the said road or way; and that plaintiff, in the expectation that he should have a good title made to the said estate, entered into the possession thereof soon after signing the said agreement, and has ever since been, and now is, in the possession thereof, and has, at great expense, to-wit, . . . dollars, purchased a piece of ground, and made a road from the estate to . . . street.

IX. [Where there is an outstanding incumbrance:] That the defendant's title to the premises is incumbered by a mortgage to one M. N. for . . . dollars, with interest semi-annually, which mortgage is not payable until the . . . day of . . . , 19 . . .

Wherefore, the plaintiff demands judgment:

That a just deduction from the purchase money be made on account of said deficiency, and on account of the plaintiff not having the benefit of said right of way, and on account of said incumbrance, and for interest on plaintiff's purchase money which has lain idle; and that on payment of the residue of said purchase money [or, in delivery of said bond and mortgage], the defendant be adjudged to specifically perform said agreement; and that the plaintiff have such further relief as may be equitable, with the costs of this action.

§ 7003. Complaint by vendee against vendor to enforce oral contract of sale when contract has been so far performed as to take case out of statute of frauds.

Form No. 1856.

[TITLE.]

The plaintiff complains, and alleges:

I. That the defendant was on the . . . day of . . . , 19 . . . , the owner in fee of the following real estate: [insert description], and that defendant still has the legal title to said lands.

II. That on the said day defendant sold said premises to the plaintiff for the sum of . . . dollars, payable [state terms] by

an oral contract, whereby he agreed to convey said premises to plaintiff by a warranty deed, upon the payment by the plaintiff of the consideration aforesaid.

III. That defendant thereupon delivered the possession of said premises to the plaintiff under said contract, and the plaintiff has ever since been and still is in possession of the same under said contract.

IV. That plaintiff has paid to the defendant the entire consideration aforesaid, [or, the following sums to apply upon said consideration, to-wit: state amounts and when paid].

V. That there is still due said defendant the sum of . . . dollars under said contract, which sum the plaintiff tendered to the defendant on the . . . day of . . . , 19 . . . , but the defendant then refused, and still refuses, to execute and deliver a proper deed of said premises to the plaintiff.

VI. That plaintiff, while in possession of said premises under said contract, has erected a building upon said premises [or made other improvements, specifying them] of the value of . . . dollars.

VII. That plaintiff has duly performed all of the conditions of said contract on his part, and now brings the balance of the purchase money, to-wit, the sum of . . . dollars into court, and offers the same to said defendant upon his executing and delivering to plaintiff a proper conveyance of said premises according to the terms of said contract.

Wherefore, plaintiff prays, that defendant be required to receive the said sum so brought into court, and to specifically perform the said contract on his part, by executing and delivering to the plaintiff a good and sufficient deed of the said premises; and that the plaintiff have such further relief as may be equitable, and the costs of this action.

§ 7004. Complaint by creditor, for performance of agreement to give a chattel mortgage.

Form No. 1857.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the plaintiff and defendant entered into an agreement whereby the plaintiff, then being the owner of [designate the goods, or, if numerous, attach schedule], agreed to sell and deliver the same to the defendant; in consideration whereof, the defendant promised to pay him . . .

dollars cash upon the delivery of said goods and . . . dollars, . . . months from the date of said delivery, and to give on the delivery of such goods a chattel mortgage thereon to the plaintiff, to secure the payment of said . . . dollars.

II. That pursuant to said contract the plaintiff, on the . . . day of . . . , 19 . . . , delivered said goods to the defendant, who is now in possession thereof, and who paid him the sum of . . . dollars, but failed to deliver to him a chattel mortgage thereon, pursuant to said agreement; and although afterwards, on the . . . day of . . . , 19 . . . , requested to deliver such chattel mortgage to plaintiff, he refused so to do.

Wherefore, the plaintiff demands judgment, that the defendant execute and deliver to the plaintiff a chattel mortgage on said goods, pursuant to said contract; and that the plaintiff have such further relief as may be just, with the costs of this action.

§ 7005. Complaint by lessee for specific performance of agreement to lease real estate.

Form No. 1858.

[TITLE.]

The plaintiff complains, and alleges:

I. That on the . . . day of . . . , 19 . . . , the defendant was, and still is, the owner of the following described premises: [insert description]; and that on said day the plaintiff and defendant entered into a written agreement whereby the said defendant agreed to lease said premises to the plaintiff for the term of . . . years from . . . , 19 . . . , at the annual rental to be paid by plaintiff of the sum of . . . dollars, to be paid on the . . . day of . . . in each year. [Or attach copy of the lease as an exhibit to complaint.]

II. That in reliance upon said agreement, the plaintiff, on or about the . . . day of . . . , 19 . . . , repaired and improved the dwelling-house upon said premises, at an expense of . . . dollars. [Or state other acts done in reliance upon the agreement in accordance with the facts.]

III. That plaintiff has duly performed all of the conditions of said agreement on his part to be performed, and has always been, and now is, ready and willing to accept a lease of said premises, and on the . . . day of . . . , 19 . . . , duly tendered to the defendant the rent of said premises for the first year, and requested that defendant execute a lease thereof according to the terms of

said agreement, but that defendant refused, and still refuses, to make such agreement.

IV. That by reason of the premises, the plaintiff has no adequate remedy at law for the breach of said agreement by the defendant.

Wherefore, plaintiff demands judgment, that the said defendant be required to specifically perform said agreement and execute and deliver the said lease, and that plaintiff have such further relief as may be equitable, and for the costs of this action.

ANSWERS.

§ 7006. Denials.

Form No. 1859.

[TITLE.]

The defendant answers to the complaint, and alleges:

I. That he did not contract and agree with the said plaintiff, in manner or form as alleged in the complaint, or in any manner or form, or at all.

II. That the said plaintiff did not pay to the said defendant the said sum of . . . dollars, in manner or form as he alleges, or at all.

III. That the said plaintiff did not tender the said sum of . . . dollars to the defendant, at the time alleged, or at any time.

IV. That said plaintiff did not put said defendant into the possession of the said premises, at the time stated, or at any time or in any manner.

V. That the said plaintiff was not seised in fee of the said premises, and could not make to the said defendant a good and sufficient title thereto, as by his said contract he was bound to do; but, on the contrary, [state incumbrances—this answer, like all answers, must be made according to the facts of each particular case].

§ 7007. Denial of readiness to convey.

Form No. 1860.

[TITLE.]

The defendant answers to the complaint:

That the plaintiff was not ready or willing to convey the premises, as alleged, or to convey them at all.

§ 7008. Performance.

Form No. 1861.

[TITLE.]

The defendant answers to the complaint:

I. That he duly performed said contract upon his part in all things.

II. [State facts showing performance.]

§ 7009. Denial of part performance.

Form No. 1862.

[TITLE.]

The defendant answers to the complaint:

That the said A. B. did not take possession of the said premises, or do the said acts, or make the said improvements thereon, alleged, nor has he in any part performed the alleged contract.

§ 7010. A demand after the plaintiff's tender.

Form No. 1863.

[TITLE.]

The defendant answers to the complaint:

I. That after the making of the tender alleged, and on the . . . day of . . . , 19 . . . , at . . . , the defendant requested the plaintiff to pay him said sum.

II. That the plaintiff then and ever since refused to pay the same.

§ 7011. Rescission of contract.

Form No. 1864.

[TITLE.]

The defendant answers to the complaint:

That after the contract alleged in the complaint, and before any breach thereof, it was agreed by and between the plaintiff and the defendant that the said contract should be waived, abandoned, and rescinded; and they then waived, abandoned, and rescinded the same accordingly.

§ 7012. Equitable counterclaim for specific performance.

Form No. 1865.

[TITLE.]

The defendant answers to the complaint:

I. The defendant denies that the plaintiff at the time of the commencement of this action was the owner or entitled to the possession of the premises described in the complaint.

Second. By way of counterclaim, defendant alleges:

I. That on the . . . day of . . . , 19 . . . , the plaintiff was the owner of said premises, and now has the legal title thereto; but on that day the plaintiff, by a contract in writing, of which a copy is annexed as a part of this answer, marked "Exhibit A," sold, and agreed to convey, the same to the defendant, on the terms therein specified, and put the defendant in possession thereof as purchaser.

II. That the defendant duly performed all the conditions thereof on his part, and on the . . . day of . . . , 19 . . . , tendered to the plaintiff the sum of . . . dollars, being the full sum then due the plaintiff upon said contract, with interest, but plaintiff then refused to receive the same.

III. That defendant has ever since remained, and still is, ready and willing to pay plaintiff said sum, but the plaintiff has at all times refused to receive the same; and this defendant now brings the said sum of . . . dollars into this court, to be paid to the said plaintiff, if he will receive the same.

[Demand for judgment as in action for specific performance.]

§ 7013. *Lis pendens*, in action for specific performance.

Form No. 1866.

[TITLE.]

Notice is hereby given, that an action has been commenced and is pending in the above-named court, upon a complaint of the above-named plaintiff against the above-named defendant; that the object of said action is to enforce the specific performance of a certain contract in writing made between the plaintiff and one C. D., dated . . . , 19 . . . , and recorded in the office of the county recorder of . . . county, on the . . . day of . . . , 19 . . . , in book . . . , on page . . . , by which contract the said C. D. agreed, among other things, to convey to the plaintiff, his heirs or assigns, the premises hereinafter described, upon the payment of the consideration therein named and performance of the other terms of said contract, and said contract having been duly performed by the plaintiff on his part; and that said action affects the title to the real estate described as follows, to-wit: [Here

insert accurate description of the property affected as the same is described in the complaint or petition.]

Dated . . . , 19..

J. K., Plaintiff's Attorney.

[If the defendant in his answer sets up an affirmative cause of action affecting real property, he may also file a *lis pendens*, in which case the forms herein given may be used, with suitable changes.]

§ 7014. Order of reference to take testimony as to value of use and occupation in action for specific performance.

Form No. 1867.

[TITLE.]

It is hereby ordered, after hearing counsel for the plaintiffs and defendants, that it be referred to R. F., Esq., to take such testimony as may be produced before him by either party to this cause in relation to the value of the use and occupation, by C. D., of the premises [briefly designating them], since the . . . day of . . . , 19 . . . , and the amounts received and collected by C. D., or which, with reasonable diligence, might have been received and collected for the same since said day, the amounts expended by said C. D. for taxes, assessments, repairs, or otherwise, in and upon said premises, [and also in relation to all policies of insurance upon said premises, and as to any actions brought upon the same].

And it is further ordered, that the said referee report said testimony with all convenient speed.

§ 7015. Judgment for specific performance of land contract against vendor.

Form No. 1868.

[TITLE.]

[Recite trial and findings.]

Now, on motion of G. H., attorney for plaintiff,—

It is ordered, adjudged, and decreed:

I. That the agreements set forth in the complaint, and proven in this cause, be specifically performed; and that the defendant [vendor], within ten days from the date of service upon him of notice of the entry of this judgment, execute and deliver to the plaintiff a good and sufficient conveyance in fee, with the usual covenants [or, a good and sufficient deed of quitclaim in the usual form, according to the agreement], of the following-described premises: [Description.]

II. It is further adjudged, that the plaintiff, upon the delivery or tender of said conveyance, do pay to the defendant or his attorney . . . dollars, the residue of the purchase money named in the contract set forth in the complaint, with interest from the . . . day of . . . , 19.., less however the sum of . . . dollars, being the amount of the deduction and abatement to which the plaintiff is hereby adjudged to be entitled, for the deficiency in the amount of the land agreed to be conveyed.

III. It is further adjudged, that if the plaintiff, upon a tender of said conveyance, refuse to pay the sum so found due, the plaintiff be forever barred of his right to a specific performance of said contract; and that the contract be given up to be canceled.

IV. It is further adjudged, that the plaintiff recover of the defendant . . . dollars, costs of this action, and may have execution therefor, and for the amount of purchase money after deducting the abatement, to-wit, the sum of . . . dollars, with interest, adjudged due as aforesaid.

§ 7016. Interlocutory judgment denying specific performance but retaining action for recovery of damages.

Form No. 1869.

[TITLE.]

[Recite trial and findings.]

It is ordered, adjudged, and decreed, that specific performance of the contract set forth in the complaint be and the same hereby is denied, but that this action be retained to allow the plaintiff to establish his claim for damages suffered by reason of the defendant's breach of said contract.

It is further adjudged, that if within thirty days from the date of the entry of this judgment the plaintiff elect in writing, to be filed with the clerk of this court, to proceed in this action to recover said damages, he be allowed so to proceed, but that in case of failure so to elect, final judgment shall be entered upon notice to the plaintiff dismissing the complaint upon the merits.

§ 7017. Judgment allowing plaintiff to redeem.

Form No. 1870.

[TITLE.]

[Recite trial and findings.]

It is ordered, adjudged, and decreed, that the plaintiff pay unto the said defendant . . . dollars, the amount which is so

found and reported due to him, for principal and interest as aforesaid, with . . . dollars for the said value of his improvements, and with . . . dollars costs, hereby adjudged to the plaintiff, within six months after the entry of this judgment, and service of notice thereof [with interest thereon from the date of the above-mentioned report, until the time of such payment], at [specifying place and hours for payment]; and that the said defendant do resurrender the said mortgaged premises unto the said plaintiff, or unto such person or persons as he shall direct, free and clear of all incumbrances, made, done, or suffered by him, or any person claiming by, from, or under him, and deliver unto the said plaintiff, on oath, under the direction of the court, if the parties cannot agree in respect thereto, all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the said plaintiff's paying unto the said defendant what is so reported to be due to him for principal, interest [improvements], and costs as aforesaid, it is ordered that this action do from thenceforth stand dismissed out of this court, with costs.

§ 7018. Affidavit by defendant of non-payment of redemption money.

Form No. 1871.

[TITLE.]

[VENUE.]

Y. Z., the above-named defendant, being duly sworn, says that he has not, nor has any other person or persons on his behalf, at any time heretofore received or been paid the sum of . . . dollars, or any part thereof, which by the judgment made in this cause, on the . . . day of . . . , 19.., [and the referee's report dated . . . , 19.., made in this cause pursuant to the said judgment] was ordered and appointed to be paid to this deponent; but that the said sum of . . . dollars, with interest, now remains due and owing to this deponent upon the mortgage in the said judgment mentioned.

[JURAT.]

Y. Z.

§ 7019. Final order of dismissal because of non-payment of redemption moneys.

Form No. 1872.

[TITLE.]

Upon the judgment in this cause, entered on the . . . day of . . . , 19.., and on reading and filing due proof of service upon

the said plaintiff more than six months since of notice of the entry of the same, and on reading and filing the affidavit of the said defendant, showing that the amount thereby required to be paid has not been paid, but that the whole of the said sum of . . . dollars still remains due and owing from the plaintiff to the said defendant for his principal, interest, and costs:

On motion of J. K., of counsel for the defendant, and on hearing of G. H., of counsel for the plaintiff, in opposition,—

It is ordered and adjudged, that this action be and hereby is dismissed, with . . . dollars costs of motion, to be paid by plaintiff to defendant's attorney.

CHAPTER CLV.

QUO WARRANTO—USURPATION OF OFFICE OR FRANCHISE.

§ 7020. **Action in general.**—The writ of *quo warranto* is the state's right, and is only to be issued for the state's benefit, in cases where the public convenience and welfare require it.¹ It would seem to be, and generally is, a mixed action for the double purpose of vindicating public policy and enforcing private remedy.² Actions for the usurpation of any office, franchise, or liberty, or on the part of a corporation for the usurpation of a franchise not authorized by law, are brought by the attorney-general.³ He may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto.⁴ It is a remedy provided by the code,⁵ though the distinction between writs of mandate and *quo warranto* are still recognized.⁶ It is the proper remedy to try the right to an office.⁷ By the common-law remedy, it is to oust the wrongful holder of office, and not to install the relator or any person into such office.⁸ The contestant in a proceeding to contest an election cannot take judgment by default; the allegations must be proved.⁹ Where a city charter provides that the common council shall judge of the qualifications, elections, and returns of their own members, the council possesses exclusive authority to pass on the subject, and courts have no jurisdiction to inquire into those matters.¹⁰ Where a failure to qualify works a forfeiture of the office, *quo warranto* is the ancient and appropriate, and usually the exclusive, method of judiciously ascertaining the fact and ejecting an unlawful incumbent.¹¹ In such actions, the court may not only determine the right of the defendant, but of the

1 Searcy v. Grow, 15 Cal. 117.

2 People v. Gillespie, 1 Cal. 342.

3 Commonwealth v. Union Fire etc. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; State v. Anderson, 45 Ohio St. 196; Territory v. Lockwood, 3 Wall. 236, 18 L. Ed. 47.

4 Cal. Code Civ. Proc., § 804.

5 People v. Olds, 3 Cal. 175, 58 Am. Dec. 398.

6 People v. Olds, 3 Cal. 177, 58 Am. Dec. 398. See People v. Dashaway

Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

7 People v. Scannell, 7 Cal. 439.

8 Albright v. Territory, 13 N. Mex. 64, 79 Pac. 719, 200 U. S. 9, 26 Sup. Ct. Rep. 210, 50 L. Ed. 346.

9 Keller v. Chapman, 34 Cal. 635; Searcy v. Grow, 15 Cal. 117; Dorsey v. Barry, 24 Cal. 449.

10 People v. Metzker, 47 Cal. 524.

11 Hyde v. State, 52 Miss. 665.

relator also; and if it determine in favor of the relator, may render judgment that the defendant forthwith deliver up to the relator the office.¹² A person holding a certificate of election without legal title to the office is an intruder.¹³ And the action lies against an intruder into the office created by the charter of a corporation.¹⁴ A certificate of election is not necessary to enable a party claiming to have been elected to bring this suit.¹⁵ Where several claim an office, their rights may be determined in a single action.¹⁶

For usurpation of, intrusion into, or unlawful holding any public office, civil or military, this action will lie;¹⁷ or to try the title to office;¹⁸ or to test the right of an appointee of the board of pilot commissioners;¹⁹ or against one in possession of an office to which he had not been duly elected, but who holds a certificate from the board of election canvassers. The possession of the certificate affords him at most but a color of title, and does not invest him with the right which belongs to another.²⁰ It is only *prima facie* evidence of title to the office, and not conclusive.²¹ It is competent to go behind the certificate in such proceedings, as the issuance of a commission is a mere ministerial act.²² Damages sustained by reason of the usurpation may be recovered by action.²³

§ 7021. Remedy by quo warranto, generally considered.—The writ of *quo warranto* and information in the nature of *quo warranto* were both common-law remedies. But the former has long been superseded in practice by the latter, which is now the usual proceeding both in English and American practice to oust a usurper from office.²⁴ Information in the nature of *quo warranto*, which has succeeded the writ of that name, was originally in form a criminal proceeding to punish usurpation of franchise by fine, as well as to seize franchise. This information

¹² *People v. Banvard*, 27 Cal. 470.

¹³ *People v. Jones*, 20 Cal. 50.

¹⁴ *People v. Kip*, 4 Cow. 382;
People v. Tibbets, 4 Cow. 358.

¹⁵ *Magee v. Board of Supervisors of Calaveras Co.*, 10 Cal. 376.

¹⁶ Cal. Code Civ. Proc., § 808.

¹⁷ *People v. Olds*, 3 Cal. 167, 58 Am. Dec. 398; *Lewis v. Oliver*, 4 Abb. Pr. 121; *People v. Sampson*, 25 Barb. 254.

¹⁸ *People v. Scannell*, 7 Cal. 432;
Mayor of New York v. Conover, 5 Abb. Pr. 171.

¹⁹ *People v. Woodbury*, 14 Cal. 43.

²⁰ *People v. Jones*, 20 Cal. 50.

²¹ *Magee v. Board of Supervisors*, 10 Cal. 376.

²² *Conger v. Gilmer*, 32 Cal. 75;
People v. Seaman, 5 Denio, 409.

²³ Cal. Code Civ. Proc., § 807.

²⁴ See *Territory v. Ashenfelter*, 4

has, in process of time, become in substance a civil proceeding to try the mere right to franchise or office.²⁵ Whether the constitution of 1879, restoring the writ of *quo warranto* in California, had the effect of repealing sections 803-809 of the Code of Civil Procedure, makes little difference, as the power under a writ of *quo warranto* is quite as broad as under the provisions of those sections, and a sufficient information or complaint under the code sections will be sustained as in support of a writ of *quo warranto*. In fact, there is now so little difference between the proceeding strictly in form of a *quo warranto* and a regular action under the code sections that it is hardly worthy of discussion.²⁶ A proceeding by the people in the nature of *quo warranto* for the purpose of trying the incumbent's title to office, is not an "election contest" within the meaning of the Colorado constitution; and statutes passed by the legislature, in obedience to the constitutional mandate relating to contested elections, do not deprive the courts of jurisdiction to inquire by *quo warranto* into usurpations and unlawful holdings of office.²⁷

In North Dakota, the title to a county office may be tried either by the statutory mode of contest^{27a} or by a civil action in the nature of *quo warranto*, initiated by an official representative of the county, as provided by section 5354 et seq. of the Compiled Laws.²⁸ In the exercise of its original jurisdiction, the supreme court, exercising its discretion, will issue the writ of *quo warranto* only when applied for as a prerogative writ, and where the question presented is one *publici juris*.²⁹ An information in the nature of *quo warranto* is held to be the proper remedy for a city officer who has been removed from office upon certain charges and findings made against him by the mayor, who has appointed a successor.³⁰ But such proceeding will be dismissed when filed against the incumbent of an office for the sole purpose of having a judicial determination as to who possesses the power of appointment to

N. Mex. 85 (93), 12 Pac. 879; *People v. Havird*, 2 Idaho, 531, 25 Pac. 294; *Bradford v. Territory*, 1 Okla. 366, 34 Pac. 66.

²⁵ *People v. Dashaway Assoc.*, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

²⁶ *Id.*; *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 611, 49 Pac. 736.

²⁷ *People v. Londoner*, 13 Colo. 304, 22 Pac. 764, 6 L. R. A. 444. And

see *People v. Reid*, 11 Colo. 138, 17 Pac. 302.

^{27a} Comp. Laws, §§ 1489-1501.

²⁸ *Butler v. Callahan*, 4 N. Dak. 481, 61 N. W. 1025.

²⁹ *State v. Nelson County*, 1 N. Dak. 88, 26 Am. St. Rep. 609, 45 N. W. 33, 8 L. R. A. 283.

³⁰ *State v. Van Brocklin*, 8 Wash. 557, 36 Pac. 495; *State v. Kirkwood*, 15 Wash. 298, 46 Pac. 331.

such office, it being apparent that the defendant will remain in office whatever may be the decision.³¹ In a proceeding by the state in the nature of a *quo warranto* to deprive a corporation *de facto* of its corporate charter and procure its dissolution on the ground of a want of substantial compliance with the statutory requirements in its formation, the corporation *de facto* is a necessary party, and making it such, with the averment that it is a corporation *de facto*, but not *de jure*, does not estop the state from questioning its corporate character.³² A complaint in *quo warranto* against a toll-road company, alleging "that for more than six months last past defendant has had no franchise or right to demand or take toll," etc., does not admit that the defendant ever had a toll-road franchise.³³ A proceeding in the nature of a *quo warranto*, under the Alabama statute, for the dissolution of a corporation, is not a "civil action," and it is not necessary for the proceeding to be commenced by summons and complaint, nor that the relator should obtain the permission or any order from any court. The proceeding may be brought on the information of any person, giving security for the costs.³⁴

§ 7022. **Statutory quo warranto.**—While the statutes have changed the form of pleading with respect to rights and wrongs of which *quo warranto* was formerly the remedy, the change is simply as to form, and not as to substance. The position of the parties, the rules of evidence, and the presumptions of law remain the same as before.³⁵ As to procedure, the action follows the rules prescribed for civil cases.³⁶ The action may be for the forfeiture of a particular franchise or of the whole charter.³⁷

§ 7023. **Exercise of corporate franchises.**—Generally, there are statutory provisions providing for *quo warranto* proceedings against persons or corporations unlawfully exercising any public office or franchise.³⁸

³¹ State v. McCullough, 20 Nev. 154, 18 Pac. 756.

³² People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236. As to misjoinder of parties defendant in *quo warranto* proceedings, see Preshaw v. Dee, 6 Utah, 360, 23 Pac. 763.

³³ People v. Volcano etc. Toll-Road Co., 100 Cal. 87, 34 Pac. 522.

³⁴ Capital City Water Co. v. State,

105 Ala. 406, 18 South. 62, 29 L. R. A. 743.

³⁵ People v. Clayton, 4 Utah, 421, 11 Pac. 206.

³⁶ People v. Sutter Street Ry. Co., 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104.

³⁷ People v. Dashaway Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

³⁸ Wash. Bal. Codes, § 5780.

This includes the exercise of the right to use a city's streets for gas-pipes for lighting purposes,³⁹ also, the right to govern and tax a people, which right does not lie with the city authorities outside its corporate limits.⁴⁰ The very existence of a corporation as such is a franchise, but the corporation may possess powers not franchises.⁴¹

§ 7024. **Ways versus franchises.**—There has always been a well-defined distinction between “ways” and “franchises.” The franchise can be granted only by the government, and is a sovereign prerogative in hands of a subject. A way may be granted by a private person or by the government, and the ownership of a way is not a franchise. A right of way for a pipe-line, unconnected with any privilege to take tolls or collect water-rates, or to enjoy any other special prerogative, is not a franchise.⁴² A franchise is said to be a particular privilege conferred by grant from the government and invested in individuals.⁴³ The kinds of franchises are various and almost infinite. Blackstone uses the words “franchise” and “liberty” as synonymous terms, meaning a royal privilege in a subject. Corporations or bodies politic are the most usual franchises known. A corporation, being itself a franchise, may hold other franchises.⁴⁴ The distinguishing feature of a franchise is that it does not belong to citizens generally by common right. Such rights as inhere in the sovereign power can be exercised by an individual only by virtue of a grant from such sovereign power, and the right so granted is a franchise.⁴⁵

§ 7025. **Appointment to office—De facto officer.**—Under the provisions of the California constitution, two events must coincide before the governor is authorized to appoint to an office. There must be both a vacancy and no mode provided by the constitution and laws for “filling such vacancy.”⁴⁶ The constitutional pro-

39 State v. Seattle Gas etc. Co., 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

40 People v. Oakland, 92 Cal. 611, 28 Pac. 807.

41 Spring Valley Water Works v. Schottler, 62 Cal. 69.

42 Spring Valley Water Works v. Barber, 99 Cal. 36, 33 Pac. 735, 21 L. R. A. 416; People v. Sutter Street Ry. Co., 117 Cal. 604-616, 49 Pac. 736.

43 Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110; People v. Stanford, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

44 2 Bl. Com. 37; 3 Kent Com. 458; Spring Valley Water Works v. Schottler, 62 Cal. 69, 106.

45 Lasher v. People, 183 Ill. 226, 75 Am. St. Rep. 103, 55 N. E. 663, 47 L. R. A. 802.

46 People v. Mizner, 7 Cal. 523;

vision only steps in where no other appointing power is provided; and it has been repeatedly held that the constitutional provision conferring power on the governor in the cases specified should be strictly construed when there is any doubt, so as to limit the power of the governor.⁴⁷ When an office becomes vacant, and is filled by appointment, the term of the officer appointed continues until the next election by the people authorized by law.⁴⁸ To constitute a person a *de facto* officer, as distinguished from a usurper, he should have been put into the office and have secured the holding thereof in such manner as to be considered in peaceable possession, and actually exercising the functions of an officer; an intrusion by force is not sufficient.⁴⁹ An appointment of the clerk of a court by a *de facto* judge is good as against an appointment made by the judge *de jure*, even after the judge *de facto* has been ousted and the judge *de jure* installed under judicial decision.⁵⁰ A regular officer holding over his term and until his successor qualifies, cannot be ousted by one who does not possess the qualifications, though appointed as successor.⁵¹ However, there is no provision for the holding over of a judge of the superior court, and he can be ousted at expiration of his term, though his successor has not qualified.⁵²

§ 7026. **Office defined.**—The existence or non-existence of an office is a question of law, and not of fact; some valid law must exist showing the creation of the office.⁵³ A physician appointed by the board of supervisors to attend the sick at the county hospital is an employee, and not an officer, and cannot be ousted by *quo warranto*.⁵⁴ It is otherwise if the law fixes a term of office, prescribes his duties, and provides his compensation.⁵⁵ A director of a private corporation does not hold a public office.⁵⁶

People v. Stratton, 28 Cal. 392; People ex rel. Shoaff v. Parker, 37 Cal. 639.

⁴⁷ People ex rel. Shoaff v. Parker, 37 Cal. 649. And see People v. Hammond, 66 Cal. 655, 6 Pac. 741; People v. Gunst, 110 Cal. 447, 42 Pac. 963.

⁴⁸ People v. Mathewson, 47 Cal. 442.

⁴⁹ State ex rel. Corey v. Curtis, 9 Nev. 325. See, also, Braidy v. Theritt, 17 Kan. 468; and State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409.

⁵⁰ People v. Staton, 73 N. C. 546, 21 Am. Rep. 479.

⁵¹ People v. King, 127 Cal. 570, 60 Pac. 35.

⁵² People v. Campbell, 138 Cal. 11, 70 Pac. 918.

⁵³ Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110.

⁵⁴ People v. Wheeler, 136 Cal. 652, 69 Pac. 435.

⁵⁵ People v. Harrington, 63 Cal. 257; Wall v. Board of Directors, 145 Cal. 468, 78 Pac. 951.

⁵⁶ Foster v. Superior Court, 115 Cal. 279, 47 Pac. 58.

§ 7027. **Election contest.**—There are two separate and distinct methods provided in California to contest title to office,—1. By proceedings in nature of *quo warranto* against one intruding into public office;⁵⁷ and 2. By contesting the election.⁵⁸ An election contest is to determine—1. Whether a given election was legally held; or 2. Which of two opposing candidates was legally chosen to office. No question of usurpation or unlawful holding arises, and it is an action separate and distinct from that in the nature of *quo warranto*.⁵⁹ In Colorado, a proceeding in *quo warranto* to oust from office cannot be converted into a statutory election contest.⁶⁰ Annexation proceedings submitted by statute to decision of city councils cannot be reviewed by the superior court upon *quo warranto*.⁶¹

§ 7028. **Jurisdiction.**—In California, the superior courts, and not the supreme court,⁶² have original jurisdiction to issue writs of *quo warranto* in their respective counties.⁶³ The mode of procedure under *quo warranto* (and other writs) has not in modern times been very uniform, and an information or complaint sufficient under sections 803-809 of the California Code of Civil Procedure will, the proper parties being before the court, be sustained as in support of the writ of *quo warranto*, which was restored by the constitution of 1879.⁶⁴

In North Dakota, the supreme court issues the writ of *quo warranto* only when applied for as a prerogative writ, and when it involves a question of public justice.⁶⁵

The jurisdiction of usurpation of office⁶⁶ falls within the category of “cases both at law and equity,” and, having been conferred on the superior courts by the constitution, it cannot be taken away or abridged by the legislature. And while a city board may have an accumulative jurisdiction to pass upon the right of membership in its body, so as not to be hampered in its work as

⁵⁷ Cal. Code Civ. Proc., § 803.

⁵⁸ Cal. Code Civ. Proc., §§ 1111-1127; Powers v. Hitchcock, 129 Cal. 325, 61 Pac. 1076.

⁵⁹ Day v. Gunning, 125 Cal. 527, 58 Pac. 172.

⁶⁰ People v. Horan, 34 Colo. 304, 86 Pac. 252.

⁶¹ People v. Los Angeles, 133 Cal. 338, 65 Pac. 749.

⁶² Cal. Code Civ. Proc., § 51.

⁶³ Cal. Code Civ. Proc., § 76.

⁶⁴ People v. Dashaway Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117; People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736.

⁶⁵ State v. Nelson County, 1 N. Dak. 88, 26 Am. St. Rep. 609, 45 N. W. 33, 8 L. R. A. 283.

⁶⁶ Idaho Const., art. 5, § 20; Toncray v. Bridge, 14 Idaho, 621, 95 Pac. 26.

a legal board, yet courts of competent jurisdiction may inquire on behalf of the people, the origin of all authority, into the right of any person who, by the action of such board, in fact holds place in it, and claims thereby to exercise public office.⁶⁷ In the absence of any constitutional provision to the contrary, the legislature may confer exclusive jurisdiction upon city boards to determine the election of city officers.⁶⁸ A court of equity may enjoin a person attempting to usurp the office of sheriff.⁶⁹

§ 7029. **Venue.**—In *quo warranto*, the people being a party, their residence extends to every county.⁷⁰ In actions against a corporation, the principal place of business of the corporation is its residence,⁷¹ and the action should be brought there.

§ 7030. **Parties who may sue.**—The claimant of an office may join with the people as plaintiff in a proceeding of *quo warranto*.⁷² And it may be maintained against the incumbent of an office, irrespective of whether the relator is entitled to the office, if the incumbent is not entitled thereto.⁷³ In some states, it must be brought by the attorney-general, upon his own information or the complaint of a private party who is interested,⁷⁴ and the entire control of the action is with the attorney-general,⁷⁵ who may require a bond from the informant or relator to the effect that he will pay any judgment for costs or damages recovered against plaintiff.⁷⁶ And if the action is not so instituted, cause must be shown and the permission of the court obtained.⁷⁷ In other states, the prosecuting attorney in the proper county, at his own discretion, may file all such suits, to the exclusion of the attorney-general.⁷⁸ The acts of a relator which will estop him should not estop the

⁶⁷ *People v. Bingham*, 82 Cal. 238, 22 Pac. 1039; *People v. Perry*, 79 Cal. 105, 21 Pac. 423; *State v. Morris*, 14 Wash. 262, 44 Pac. 266.

⁶⁸ *Carter v. Superior Court*, 138 Cal. 150, 70 Pac. 1067.

⁶⁹ *Armijo v. Baca*, 3 N. Mex. 294 (490), 6 Pac. 938.

⁷⁰ *People v. Cook*, 6 How. Pr. 448.

⁷¹ *Jenkins v. California Nav. Co.*, 22 Cal. 537; *Hubbard v. National Oro Ins. Co.*, 11 How. Pr. 149.

⁷² *People v. Ryder*, 12 N. Y. 433, 16 Barb. 370; *People v. Walker*, 23 P. P. F., Vol. IV—41

Barb. 304; *Toncray v. Bridge*, 14 Idaho, 621, 95 Pac. 26.

⁷³ *People v. Campbell*, 138 Cal. 11, 70 Pac. 918.

⁷⁴ Cal. Code Civ. Proc., § 803; *Toncray v. Bridge*, 14 Idaho, 621, 95 Pac. 26.

⁷⁵ *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 49 Pac. 736.

⁷⁶ Cal. Code Civ. Proc., § 810.

⁷⁷ *Toncray v. Bridge*, 14 Idaho, 621, 95 Pac. 26.

⁷⁸ Wash. Bal. Codes, § 5781; *State v. Seattle Gas etc. Co.*, 28 Wash. 488, 68 Pac. 946, 70 Pac. 114.

state against the respondent.⁷⁹ *Quo warranto* to forfeit the character of a corporation cannot be brought by a private individual claiming no interest in such corporation.⁸⁰

§ 7031. **Parties defendant.**—Any person or corporation who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within the state may be made defendant.⁸¹ All claimants may be sued in the same action.⁸² If fees have been received by the usurper, he may be arrested.⁸³ In an action to dissolve a corporation on account of illegal organization or the usurpation of powers not belonging to it, the corporation itself is a necessary party defendant; the trustees are not sufficient parties defendant.⁸⁴ But such action will not lie against a city in its corporate name to test its legal existence; for by suing the city in that name, its existence is admitted.⁸⁵ All the members of one board claiming under the same facts, having the same duties, may be joined as parties defendant in one and the same action to test the legal existence of the board.⁸⁶ But if one of the defendants came by his office in a different manner, they cannot be sued jointly.⁸⁷ The parties claiming to be the officers of a town are the proper defendants in *quo warranto* to test the validity of its incorporation.⁸⁸

§ 7032. **Parties intervening.**—A holder of bonds of an irrigation district which is charged with having usurped the franchise of being a corporation may intervene and defend the action by any proceedings or remedies that would be available to the defendant.⁸⁹

§ 7033. **Averments in complaint.**—The mode of pleading in cases of usurpation of franchises is now by no means uniform. It

⁷⁹ *Dunton v. People*, 36 Colo. 128, 87 Pac. 540.

⁸⁰ *State v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22.

⁸¹ Cal. Code Civ. Proc., § 803.

⁸² Cal. Code Civ. Proc., § 808.

⁸³ Cal. Code Civ. Proc., § 804.

⁸⁴ *People v. Flint*, 64 Cal. 49, 28 Pac. 495; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92; *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Dashaway*

Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

⁸⁵ *State v. City of South Park*, 34 Wash. 162, 100 Am. St. Rep. 998, 75 Pac. 636; *People v. Stratton*, 33 Colo. 464, 81 Pac. 245.

⁸⁶ *People v. Prewett*, 124 Cal. 7, 56 Pac. 619.

⁸⁷ *People v. Long*, 32 Colo. 486, 77 Pac. 251.

⁸⁸ *People v. Stratton*, 33 Colo. 464, 81 Pac. 245.

⁸⁹ *People v. Perris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399.

is undoubtedly true that the state may charge a corporation in general terms, and call upon it to allege and prove facts showing its right, thus placing the burden of proof upon the defendant. However, it has become quite common to allege the specific grounds or defects relied upon to show usurpation, and in that event the facts so pleaded must be sufficient to sustain the charge, and, if denied, the burden of proof is upon the plaintiff.⁹⁰ Facts showing the termination of the existence of a corporation must be pleaded.⁹¹ If the relator claims title in himself, his averments of title, if defective or insufficient on their face, are liable to demurrer; but the sustaining of such demurrer does not affect the judgment which ought to be rendered against the defendant if the averments as to his usurpation are sustained.⁹² "That an election was duly and legally held pursuant to the statute," was held sufficient as to the time, and that it was on the day prescribed by law.⁹³ A complaint in *quo warranto* against a plank-road company must aver time of incorporation or date of organization, that the court may know by what statute the decision is to be governed.⁹⁴ In an action by one claiming to have been elected to an office against his predecessor, to compel a surrender of the books and papers belonging to the office, plaintiff must show *prima facie* that a vacancy existed in the office, and that he was elected to fill it.⁹⁵ An allegation that defendant is in possession of the office without lawful authority is a sufficient allegation of intrusion and usurpation. If the complaint be defective in this particular, the defect must be reached by special demurrer.⁹⁶ In pleading a party's title to public office, an averment that under and in pursuance of the laws of this state, on a specified day, he was duly appointed to fill such office, and duly made and executed his official bond with sureties, and took the oath of office required by law, and was thereby constituted such officer, and was thenceforth entitled to hold and administer such office, is sufficient on demurrer.⁹⁷ The complaint need not state

⁹⁰ *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749; *People v. Dashaway Assoc.*, 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117.

⁹¹ *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

⁹² *State v. Price*, 50 Ala. 568.

⁹³ *People v. Ryder*, 12 N. Y. 433, 16 Barb. 370.

⁹⁴ *Covington etc. Co. v. Van Sickle*, 18 Ind. 244.

⁹⁵ *Doane v. Scannell*, 7 Cal. 393; *People v. Scannell*, 7 Cal. 439.

⁹⁶ *People v. Woodbury*, 14 Cal. 43; *People v. Superior Court*, 114 Cal. 466, 46 Pac. 383; *Powers v. Hitchcock*, 129 Cal. 325, 61 Pac. 1076. See *People v. Cooper*, 139 Ill. 461, 29 N. E. 872.

⁹⁷ *Pratt v. Stout*, 14 Abb. Pr. 178. See *State v. McQuade*, 12 Wash. 554, 41 Pac. 897.

that the claimant possessed the requisite qualifications, nor that he had taken the oath and given bond of office; nor need it state the number of votes given;⁹⁸ as the complaint may be good against the defendants without showing title in the relator.⁹⁹ Under the California statute, the complaint need not aver that it has been filed within forty days after the return day. If the complaint has not been filed within the statutory time, it is a matter of defense, to be made by answer in the nature of a plea to the jurisdiction, or to be taken advantage of by motion to dismiss the proceedings.¹⁰⁰

§ 7034. *Action in Arkansas and Louisiana.*—The writ of *quo warranto* lies against a corporation for the abuse of its charter.¹⁰¹ But in Louisiana the writ of *quo warranto* will not be granted to test the right to a state office.¹⁰²

§ 7035. *In Illinois.*—In Illinois, a proceeding by *quo warranto* is a criminal prosecution, and should be carried on "in the name and by the authority of the people of the state of Illinois," and should conclude "against the peace and dignity of the same."¹⁰³ When it is resorted to for the protection of individual rights, it is in substance, though not in form, a civil suit, and a change of venue will be allowed under the statute the same as in civil cases.¹⁰⁴ And it should be alleged that the party against whom it is filed holds and executes some office or franchise, describing it.¹⁰⁵ It is the proper mode of testing the question of forfeiture of a charter.¹⁰⁶ Leave to file an information is not granted as a matter of course; it rests in the sound discretion of the court. The

⁹⁸ *People v. Ryder*, 12 N. Y. 433, 16 Barb. 370.

⁹⁹ *People v. Abbott*, 16 Cal. 358; *Rutledge v. Crawford*, 91 Cal. 526, 25 Am. St. Rep. 212, 27 Pac. 779, 13 L. R. A. 761; *People v. Ryder*, 12 N. Y. 433, 16 Barb. 370.

¹⁰⁰ *Preston v. Culbertson*, 58 Cal. 198. Election contest as to sufficiency of complaint or petition, see *Todd v. Stewart*, 14 Colo. 286, 23 Pac. 426; *Egan v. Jones*, 21 Nev. 433, 32 Pac. 929. As to sufficiency of complaint in action for usurpation of office, see *People v. McIntyre*, 10 Mont. 166,

25 Pac. 100; *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182, 21 Pac. 898.

¹⁰¹ *Smith v. State*, 21 Ark. 294.

¹⁰² *Terry v. Stauffer*, 17 La. Ann. 306.

¹⁰³ *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459; *People v. Mississippi etc. R. R. Co.*, 13 Ill. 66; *Wight v. People*, 15 Ill. 417. See *Puterbaugh's Pl. & Pr.* 669.

¹⁰⁴ *People v. Shaw*, 13 Ill. 581.

¹⁰⁵ *People v. Ridgley*, 21 Ill. 65.

¹⁰⁶ *Williams v. President etc.*, 1 Gilm. 667; *Baker v. Admr. of Backus*, 32 Ill. 82.

court or judge may grant leave, or may enter an order on the defendants to show cause why an information should not be filed. The fact that the relator took part in an election of the officers complained against is a fatal objection to the application on his part for leave to file an information charging them with unlawfully acting as such.¹⁰⁷

§ 7036. In Massachusetts.—The proceeding in *quo warranto* is applied to testing the right to the use of lands below low-water mark.¹⁰⁸ In Massachusetts, the action lies for the purpose of dissolving a corporation, or seizing its franchises;¹⁰⁹ in cases of usurpation by individuals of offices holden of the commonwealth;¹¹⁰ against an officer appointed by the governor and council, viz. a judge of probate, as well as those holding corporate offices or franchises.¹¹¹ So of the right of persons exercising the functions of parish officers *in colore officii*.¹¹² Against a corporation, for a forfeiture of its charter;¹¹³ or a violation of its charter.¹¹⁴ It does not lie against the managers of a lottery appointed by a corporation having the grant of such lottery.¹¹⁵ Nor against a railroad company in behalf of a stockholder merely because the corporation issued stock below the par value, and began to construct its road before the requisite amount of stock was subscribed, if the petitioner's private interest was not put in hazard.¹¹⁶ The information must be filed by the attorney-general;¹¹⁷ or the solicitor general.¹¹⁸

§ 7037. In Michigan.—Where the information averred that an election to fill the offices was held, and the relator duly elected, a plea was held to be good which set forth that no votes were cast to fill such office.¹¹⁹ The court will not dismiss an information in the nature of a *quo warranto* on motion of the relator whose

¹⁰⁷ *People v. Moore*, 73 Ill. 132.

¹⁰⁸ *Commonwealth v. City of Roxbury*, 9 Gray, 451.

¹⁰⁹ *Commonwealth v. Union Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

¹¹⁰ *Commonwealth v. Fowler*, 10 Mass. 295. See, also, *People v. Montecito Water Co.*, 97 Cal. 278, 33 Am. St. Rep. 172, 32 Pac. 236.

¹¹¹ *Felton v. Dickinson*, 10 Mass. 290.

¹¹² *First Parish in Sudbury v. Stearns*, 21 Pick. 155.

¹¹³ *Commonwealth v. Tenth Mass. Turnpike Co.*, 5 Cush. 509.

¹¹⁴ *Commonwealth v. Tenth Mass. Turnpike Co.*, 11 Cush. 171.

¹¹⁵ *Commonwealth v. Dearborn*, 15 Mass. 125.

¹¹⁶ *Hastings v. Amherst etc. R. R. Co.*, 9 Cush. 596.

¹¹⁷ *Goddard v. Smithett*, 3 Gray, 116; *Commonwealth v. Union Fire etc. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

¹¹⁸ *Id.*

¹¹⁹ As to its exercise in the dissolu-

name was used without his authority, but will amend the information by striking out the relator's name.¹²⁰ Judgment of ouster will be given by default.¹²¹ If the defendant does not disclaim, he must justify; and his justification must show all the facts necessary to establish his lawful right to hold the office; and this affirmative showing he has the burden of maintaining.¹²²

§ 7038. In Missouri.—A writ of *quo warranto* is in the nature of a writ of right for the state, against any person who claims or exercises any office, to inquire by what authority he supports his claim, and it issues as a matter of course.¹²³ Leave of court must first be obtained before the information can be filed, as the relation of a private person, but otherwise when the attorney-general files the information *ex officio*. The jurisdiction of the supreme court being appellate, it refused to issue the writ.¹²⁴ It is a civil proceeding.¹²⁵ The sheriff of the old county may proceed against the person assuming to act as sheriff of the new county, when the act establishing the new county within the borders of the old county is unconstitutional.¹²⁶ Where an office is already filled by a person holding by color of right, *quo warranto* is the proper remedy.¹²⁷ A recorder who has failed to take and file the oath prescribed by the new constitution may be removed upon an information in the nature of a *quo warranto*.¹²⁸ In a suit against a defaulter, the petition should show that the person, when appointed to the second office, was in default, and accountable for public moneys.¹²⁹ Neither in Missouri nor under the statute of Anne is the relator necessarily a claimant for the office alleged to be usurped; nor is the relator's title necessarily examined into, except so far as it may incidentally or indirectly affect the right of the defendant; nor can the qualification of electors be inquired into upon an information in the nature of *quo warranto*.¹³⁰

tion of insolvent corporations, see *People v. President etc. Bank of Pontiac*, 12 Mich. 527.

¹²⁰ *People v. Knight*, 13 Mich. 230.

¹²¹ *People v. Connor*, 13 Mich. 238.

¹²² *People v. Crawford*, 28 Mich. 88.

¹²³ *State v. St. Louis Perpetual etc. Ins. Co.*, 8 Mo. 330; *State v. Stone*, 25 Mo. 555.

¹²⁴ *State v. Stewart*, 32 Mo. 379.

¹²⁵ *State v. Lingo*, 26 Mo. 496.
See, also, *People v. Stanford*, 77 Cal.

360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92; *Central etc. Road Co. v. People*, 5 Colo. 39; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482.

¹²⁶ *State v. Scott*, 17 Mo. 521.

¹²⁷ *St. Louis County Court v. Sparks*, 10 Mo. 117, 45 Am. Dec. 355.

¹²⁸ *State v. Bernoudy*, 36 Mo. 279.

¹²⁹ *Ex parte Bellows*, 1 Mo. 115.

¹³⁰ *State v. Vaile*, 53 Mo. 97; *State v. Townsley*, 56 Mo. 107.

§ 7039. **In New York.**—In New York, an action in the nature of a *quo warranto* is a civil action.¹³¹ It may be maintained to establish title to a public office. In such action it may be shown that a sufficient number of the votes cast for a person who received the certificate were illegal, to annul his majority, and his election may be set aside for that reason.¹³² Such action lies against a corporation of which a receiver was appointed on account of its insolvency, to vacate its charter and prohibit it from acting.¹³³ It lies against a corporation for carrying on banking business without authority, this being a franchise given by statute.¹³⁴ So is the possession of corporate powers.¹³⁵ So is the appointment of professors of an incorporated college.¹³⁶ The object of the code is to provide a speedy and effective mode of determining the claims of persons to exercise the duties of any office within the state, and it necessarily involves a determination of the existence of the particular office.¹³⁷ An action cannot be maintained by an individual either as corporator or taxpayer to determine the legality of the election of one claiming to hold a municipal office, unless plaintiff is thereby affected in his private rights as distinct from other corporators. The remedy is by appropriate proceedings in the name of the people of the state.¹³⁸ It is a public prosecution instituted and conducted by the public prosecutor under his official obligation and responsibility.¹³⁹ The Oregon statute is sufficiently complied with where the complaint, on relation of a private person, is signed by the prosecuting attorney in his official capacity.¹⁴⁰ Nor can an action be maintained by an individual claiming to hold a municipal office to determine his right thereto, when it does not appear that any person claims the right thereto in hostility to him, or that his legal rights as officer have been interfered with by the de-

¹³¹ *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; affirming 14 Barb. 259. That it is so in North Dakota, see *Butler v. Callahan*, 4 N. Dak. 481, 61 N. W. 1025.

¹³² *People v. Pease*, 27 N. Y. 45, 84 Am. Dec. 242.

¹³³ *People v. Rensselaer Ins. Co.*, 38 Barb. 323; *People v. Washington Ice Co.*, 18 Abb. Pr. 382.

¹³⁴ *People v. Utica Ins. Co.*, 15 Johns. 358, 8 Am. Dec. 243.

¹³⁵ *People v. Tibbets*, 4 Cow. 384.

¹³⁶ *People v. Trustees Geneva College*, 5 Wend. 211.

¹³⁷ *People v. Carpenter*, 24 N. Y. 86.

¹³⁸ *Demarest v. Wickham*, 63 N. Y. 320.

¹³⁹ *In re Gardner*, 68 N. Y. 467; *People v. Fairechild*, 67 N. Y. 334; *Robinson v. Jones*, 14 Fla. 256; *Everding v. McGinn*, 23 Or. 15, 35 Pac. 178.

¹⁴⁰ *State v. Stevens*, 29 Or. 464, 44 Pac. 898.

fendant.¹⁴¹ The burden is on the defendant of showing that he has a legal title to the office before he can have judgment in his favor; but a failure on his part to do so does not establish the title of the relator. Upon that issue plaintiffs have the affirmative, and the burden of proof is on them.¹⁴² The evidence of voters is proper, and they may be required to testify for whom they voted.¹⁴³

§ 7040. **In North Carolina.**—An information in the nature of a writ of *quo warranto* against a corporation, to have its privileges declared forfeited because of neglect and abuse in their exercise, must be brought in the name of the attorney-general, and cannot be instituted in the name of a solicitor of a judicial district.¹⁴⁴

§ 7041. **In Ohio.**—On a judgment of ouster in *quo warranto* against an incumbent in office the court will not proceed to adjudge in favor of another claimant whose election is then in process of regular contest.¹⁴⁵

§ 7042. **In Pennsylvania.**—Jurisdiction in *quo warranto* is exercised by the supreme court, and the state has power to inquire into the exercise of the right of corporations, reserving the right of trial by jury in such cases.¹⁴⁶ The supreme court will grant the writ to try the right of a member of the common council to a seat in that body.¹⁴⁷ The writ may issue against a public officer for bribery, fraud, or any willful violation of the election law without a preliminary conviction for the offense; and the question whether the offense was committed may be tried in the proceedings under the writ of *quo warranto*.¹⁴⁸ The courts are not bound to issue the writ except in the exercise of a sound discretion.¹⁴⁹

§ 7043. **In United States territories.**—A proceeding in the nature of a *quo warranto* in one of the territories of the United

¹⁴¹ Demarest v. Wickham, 63 N. Y. 320.

¹⁴² People v. Thacher, 55 N. Y. 525, 14 Am. Rep. 312.

¹⁴³ Id.

¹⁴⁴ Houston v. Neuse River Co., 8 Jones (N. C.), 476.

¹⁴⁵ State v. Taylor, 15 Ohio St. 137.

¹⁴⁶ Commonwealth v. Delaware etc. Canal Co., 43 Pa. St. 295.

¹⁴⁷ Commonwealth v. Meeser, 44 Pa. St. 341.

¹⁴⁸ Commonwealth v. Walter, 83 Pa. St. 105, 24 Am. Rep. 154.

¹⁴⁹ Commonwealth v. McCarter, 98 Pa. St. 607. See People v. Keeling, 4 Colo. 129.

States, to test the right of a person to exercise the functions of a judge of the supreme court of the territory, must be in the name of the United States, and not in the name of the territory.¹⁵⁰

§ 7044. **In Wisconsin.**—In Wisconsin, the writ and the substituted proceeding by information in the nature of *quo warranto* are abrogated by statute, and a civil action lies in their place.¹⁵¹

§ 7045. **Salary of office.**—The salary annexed to a public office is incident to the title of the office, and not to its occupation and exercise.¹⁵² And a party elected and qualified, and being ready and willing to enter upon the discharge of the duties of the office, his right to the salary is unaffected by the fact that a usurper discharged the duties of the office.¹⁵³

§ 7046. **Vacancy.**—In California, vacancy in office is defined in the constitution.¹⁵⁴ When the constitution enumerates the events that constitute a vacancy, all other causes of vacancy are excluded, except when this construction leads to an injurious result.¹⁵⁵ In the states of Pennsylvania and Missouri, it has been held that a vacancy does not occur, but the incumbent of the expired term holds over.¹⁵⁶ If an office filled by appointment of the governor requires the confirmation of the senate, such a vacancy therein as will authorize the governor to fill the same without the consent of the senate can be caused only by the death or resignation of the incumbent, or by the happening of some event, by reason of which the duties of the office are no longer discharged. The expiration of the term of the incumbent simply, if he continues to discharge the duties of the office, does not create such a vacancy as authorizes the governor to appoint without the action of the senate.¹⁵⁷

¹⁵⁰ *Territory v. Lockwood*, 3 Wall. 236, 18 L. Ed. 47. The proper practice in such cases, in *quo warranto*, stated in *United States v. Lockwood*, Burn. 215.

¹⁵¹ *State v. Messmore*, 14 Wis. 115. See *State v. West Wisconsin R. R. Co.*, 34 Wis. 197.

¹⁵² Principle affirmed in *People v. Smyth*, 28 Cal. 21; *People v. Oulton*, 28 Cal. 44.

¹⁵³ *People v. Smyth*, 28 Cal. 21; cited in *Carroll v. Siebenthaler*, 37 Cal. 193.

¹⁵⁴ *People v. Whitman*, 10 Cal. 38.

¹⁵⁵ *Id.*; *People ex rel. Brooks v. Melony*, 15 Cal. 58. As to when a vacancy occurs in an office, see *People v. Parker*, 37 Cal. 639, citing and commenting on various cases; also, *People v. Tilton*, 37 Cal. 614, likewise citing many cases and commenting thereon.

¹⁵⁶ *Commonwealth v. Hanley*, 9 Pa. St. 513; *State v. Lusk*, 18 Mo. 333.

¹⁵⁷ *People v. Bissell*, 49 Cal. 407.

§ 7047. **Dismissal.**—The attorney-general, in California, and the prosecuting attorney in the proper counties, in Washington, have control of the action, though brought upon the relation of a private party.¹⁵⁸ The information in the nature of *quo warranto* may be dismissed for want of prosecution, or a new trial may be had, in the same manner as in any other action.¹⁵⁹

§ 7048. **Defenses—Abatement.**—Neither the expiration of the term of office nor the fact that the office has been abolished, will abate an action in *quo warranto*.¹⁶⁰ The acts of the informant himself cannot be a bar,¹⁶¹ even though suit be brought and judgment had in an election contest.¹⁶² If the suit is for forfeiture of franchise for misuse or non-use, the statute of limitations may be a bar, but each day's use is a renewed usurpation.¹⁶³ However, if the sole right to maintain the action is in the attorney-general, it is questionable whether the city has power to waive a forfeiture of a street-railway franchise by limitations.¹⁶⁴

§ 7049. **Defense—Right of office.**—A plea to a *quo warranto*, that the defendants have a right to exercise the franchise, accompanied by a negation of the allegations of the writ, is not a plea of *non usurpavit*, or a disclaimer, but is a valid plea.¹⁶⁵ The defendant in an action to try the right to an office may set forth in his answer more than one defense.¹⁶⁶ He must allege with particularity all the facts essential to his eligibility at the time of his election, and to his right to hold such office down to the institution of the proceedings.¹⁶⁷

§ 7050 **Ineligibility no defense.**—In a proceeding to contest the election of defendant as district judge, the ineligibility of the candidate receiving the highest number of votes, the de-

¹⁵⁸ *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 49 Pac. 736.

¹⁵⁹ *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704; *People v. Oakland*, 123 Cal. 145, 55 Pac. 772; *People v. Peris Irr. Dist.*, 132 Cal. 289, 64 Pac. 399, 773.

¹⁶⁰ *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740, 50 Pac. 668.

¹⁶¹ *People v. Lowden (Cal.)*, 8 Pac. 66.

¹⁶² *People v. Rodgers*, 118 Cal. 393, 46 Pac. 740; *Contra*, as to franchise,

see *City of Detroit v. Ellis*, 103 Mich. 612, 61 N. W. 886, 27 L. R. A. 211.

¹⁶³ Cal. Code Civ. Proc., § 345; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92.

¹⁶⁴ *People v. Sutter Street Ry. Co.*, 117 Cal. 604, 49 Pac. 736.

¹⁶⁵ *Commonwealth v. Cross Cut R. Co.*, 53 Pa. St. 62.

¹⁶⁶ *People v. Stratton*, 28 Cal. 382.

¹⁶⁷ *People v. Owers*, 29 Colo. 535, 69 Pac. 515.

fendant being next on the list, is no defense; because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible does not give the office to the next highest on the list.¹⁶⁸

§ 7051. **Justification.**—In *quo warranto* cases, if the defendant does not disclaim holding the office, he must justify, and his plea of justification must show all the facts necessary to establish the lawful right of the respondent to the office in question; and the burden of maintaining it is on the respondent.¹⁶⁹

§ 7052. **Burden of proof.**—In *quo warranto* against claimants to an office, the burden is upon such claimants to prove all the facts necessary to establish their title to the office.¹⁷⁰

§ 7053. **Judgment.**—Judgment may be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice may require.¹⁷¹ An intervener may prosecute on appeal, though defendant does not.¹⁷² Execution is stayed on appeal by filing a proper bond.¹⁷³ An intervener failing to establish his right to office is properly liable for costs incurred after the time of his intervention.¹⁷⁴ The violation of a judgment rendered is a contempt of court, and punishable as such.¹⁷⁵ A fine imposed does not draw interest.¹⁷⁶ When against an officer or individual, the judgment is ouster; when against a corporation by its corporate name, ouster and seizure. The franchise is seized.¹⁷⁷ A judgment in favor of the relator is not a "commission of office" which will entitle him to salary pending an appeal from such judgment.¹⁷⁸

¹⁶⁸ Saunders v. Haynes, 13 Cal. 145.

¹⁶⁹ People v. Crawford, 28 Mich. 38.

¹⁷⁰ People v. Stratton, 33 Colo. 464, 81 Pac. 245.

¹⁷¹ Cal. Code Civ. Proc., § 805.

¹⁷² People v. Perris Irr. Dist., 132 Cal. 289, 64 Pac. 399.

¹⁷³ Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

¹⁷⁴ People v. Campbell, 138 Cal. 11, 70 Pac. 918.

¹⁷⁵ Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110.

¹⁷⁶ People v. Sutter Street Ry. Co., 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104.

¹⁷⁷ People v. Dashaway Assoc., 84 Cal. 114, 24 Pac. 277, 12 L. R. A. 117; People v. City of Riverside, 66 Cal. 288, 5 Pac. 350.

¹⁷⁸ Bledsoe v. Colgan, 138 Cal. 34, 70 Pac. 924.

The opinion of the appellate court, that plaintiff was lawfully appointed to the office, that his attempted removal and the appointment of respondent were invalid, given without instructions, is a sufficient determination of plaintiff's title to the office to preclude the court, in a subsequent suit for the emoluments of the office, from rendering judgment for defendant on the ground that the former judgment had not established plaintiff's title to the office.¹⁷⁹ If judgment be rendered in favor of the one alleged to be entitled, he may recover by action the damages which he may have sustained by reason of the usurpation of the office by defendant.¹⁸⁰ The court may, in its discretion, impose a fine, not exceeding five thousand dollars, which, when collected, must be paid into the state treasury.¹⁸¹ The imposition of the fine is not to compensate the state, but is intended solely as a punishment.¹⁸²

FORMS IN QUO WARRANTO.

§ 7054. By the people, etc., on the complaint of private party.

Form No. 1873.

<p>The People of the State of California, on the complaint of A. B., v. C. D.,</p>	}	<p>Plaintiff, Defendant.</p>
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The people of the state of California, by E. F., their attorney-general, upon the information and complaint of said A. B., complain of the said defendant, and allege:

I. That on the . . . day of . . . , 19 . . . , at . . . , an election was held in the . . . [precinct, district, or county] of this state, for the office of [here designate the office], for the term of . . . years, from the . . . day of . . . , 19 . . .

II. That at the said election one . . . received the greatest number of legal votes for the said office:

¹⁷⁹ Jones v. Carver, 17 Colo. App. 484, 68 Pac. 1066.

¹⁸⁰ Cal. Code Civ. Proc., § 807.

¹⁸¹ Cal. Code Civ. Proc., § 809.

¹⁸² People v. Sutter Street Ry. Co., 129 Cal. 545, 79 Am. St. Rep. 137, 62 Pac. 104.

III. That on the . . . day of . . . , 19 . . . , the defendant usurped the said office, and has ever since withheld the same from the said . . .

Wherefore, the plaintiffs demand judgment:

1. That the defendant is not entitled to the said office, and that he be ousted therefrom.

2. That the said . . . is entitled to said office, and that he be put in possession of the same.

§ 7055. The same—Against an appointed officer for holding over.

Form No. 1874.

[Title and commencement, as in form No. 1873.]

I. That on the . . . day of . . . , 19 . . . , at . . . the defendant was duly appointed . . . , by the mayor of said city of . . . , and immediately thereafter entered upon the duties of said office, and continued therein until his removal as herein stated.

II. That on the . . . day of . . . , 19 . . . , the defendant was duly removed from the said office by the mayor of said city.

III. That immediately after the removal of the defendant as aforesaid, one A. B. was duly appointed . . . , by the mayor of said city, to fill the vacancy made by the removal of the said defendant as aforesaid.

IV. That the said A. B. thereupon accepted the said office, and in the form and within the time required by law and the ordinances of the said city, took and subscribed before the mayor of the said city, and filed in his office, the oath of office of the said A. B., as such . . . , and also executed and filed in the office of the . . . of the said city, an official bond, with sufficient sureties, approved by the said . . . , in the amount prescribed by the ordinances of the said city.

V. That the said A. B., after the filing of such official oath and bond, demanded of the said defendant the possession of the said office, which the said defendant refused; and he still continues to usurp, hold, and exercise the said office to the exclusion of the said A. B.

Wherefore, the plaintiff demands judgment:

1. That the defendant is not entitled to the said office, and that he be ousted and excluded therefrom.

2. That the plaintiff is entitled to the said office, and that he

be admitted into the same and to all the rights and emoluments thereof.

§ 7056. Complaint in action to dissolve a corporation for exercising franchise not conferred by law.

Form No. 1875.

[Title and commencement, as in form No. 1873.]

I. [Aver incorporation of defendants, as in form No. 949.]

II. That said corporation, for the space of . . . months last past, has exercised, without any warrant, charter, or grant, the franchise [insert user] and has [recite its acts in this usurpation of franchise], and has exercised franchises not conferred upon it by law.

Wherefore, the plaintiff demands judgment:

1. That the defendant [naming the corporation] be excluded from all corporate rights, privileges, and franchises.
2. That the said corporation be dissolved.
3. And for costs of this action.

§ 7057. Allegation of application to attorney-general to commence action, and his refusal.

Form No. 1876.

[To be inserted where action is brought on relation of private person, and the statute requires that application be first made to the attorney-general or the state's attorney.]

That on or about the . . . day of . . . , 19 . . . and before the commencement of this action, the relator [or, plaintiff] made application in writing to the attorney-general of the said state of . . . [or, to the state's attorney for the county of . . .], that he commence an action in the nature of an action of *quo warranto* against the said . . . , for the purpose of punishing the said usurpation of office on the part of the said C. D. [or, for the purpose of vacating the corporate charter of the defendant; or otherwise, state the purpose of the action]; but that the said attorney-general refused, and still refuses, to commence said action. [Offer of security for costs; or, waiver thereof, should be alleged in jurisdictions where same may be demanded.]

§ 7058. **Complaint in action by attorney-general or state's attorney to forfeit franchises of street-railway company and vacate its charter because of failure to perform its duties.**

Form No. 1877.

[TITLE.]

The complaint of the state of . . . , on the relation of A. B., respectfully shows and alleges:

I. That the defendant, the C. D. street-railway company is a corporation duly created and existing under the laws of said state, and that it was organized for the purpose of constructing and operating a street railway in the city of . . . in said state, and that it has its principal office and place of business in said city of

II. That on the . . . day of . . . , 19.., the relator duly made application to the court of . . . for leave to bring this action, in and by a duly verified petition signed by himself [or, by E. F.]; and on the . . . day of . . . , 19.., the said court, by order duly entered, granted leave to the said attorney-general [or, state's attorney] to bring this action, and that satisfactory security has been given by bond, with sufficient sureties, duly executed and delivered, to indemnify the said state against all costs and expenses to be incurred in this action; and that this action is one of public interest.

III. That on or about the . . . day of . . . , 19 . . . , in and by an ordinance of the said city of . . . , entitled "An ordinance conferring certain rights and privileges upon the C. D. street-railway company," authority and permission were granted to the said C. D. street-railway company to lay and maintain a single or double-track street railway on certain streets of said city, and operate street-cars thereon by electric power, with all necessary switches, curves, turnouts, and other appliances and conveniences, on the express condition that the said C. D. street-railway company should construct and have in operation one line of the said railway, extending from . . . to . . . , on or before the . . . day of . . . , 19 . . . , and should thereafter, at all times during the continuance of the rights granted by said ordinance, maintain and operate the same; that said franchise was limited by said ordinance to a period of twenty-five years from the date of the passage thereof. And it was further conditioned, that if said railway company failed or neglected to construct and complete, and thereafter operate, the said lines of railway over the routes and within the

time in said ordinance provided, then said company should forfeit all rights, privileges, and franchises in said ordinance granted, and the same should become null and void and of no effect; and that said railway company, as a condition of accepting the rights and authority hereby granted, agreed to construct the said railway in a good and substantial manner, and in accordance with the approved plans for the construction of such railway, and further agreed [here insert any further conditions contained in the ordinance with regard to the building of the road, its maintenance, and the duties of the street-railway company which are claimed to have been violated].

IV. That it was further enacted in and by said ordinance, that the same should be null and void, and that all rights granted thereby should cease and be of no effect, unless said company should file a written acceptance of the same with the clerk of said city within sixty days after the passage thereof; that said ordinance was passed by the common council of the said city of . . . on the . . . day of . . . , 19.., and that the said C. D. street-railway company thereafter accepted the privileges and franchise granted in said ordinance, by filing with the clerk of said city its written acceptance thereof on the . . . day of . . . , 19..

V. That the said C. D. street-railway company, by virtue of the rights and privileges granted by said ordinance, thereafter constructed a street-railway track beginning at [name and describe the track constructed]; and that the said C. D. street-railway company thereafter commenced to operate the said street-railway track, by the running of cars thereon, but that said street-railway company wholly failed and neglected to comply with the conditions and provisions of said ordinance in the following respects, to-wit: that the said company has wholly failed and neglected to grade the streets between the rails of its said track, so as to restore said portions of the streets to the proper condition of repair and to such a state of usefulness as to make said streets as serviceable and useful as is needed for the ordinary public use of the same; that the said defendant has wholly failed and neglected [here set forth particularly all breaches of the ordinance which are relied upon as grounds for vacating the franchise].

Wherefore, judgment is demanded against said defendant that it may be adjudged to have forfeited, lost, and surrendered all rights and privileges granted to it by the said ordinance, and all

its corporate rights, privileges, and franchises, and that by the judgment of this court it be excluded from the exercise of said franchises, corporate rights, and privileges, and that it be dissolved and its affairs wound up; that its property be sold and converted into money; that a receiver be appointed for the purpose of closing up the affairs of said corporation, and its property be applied to the payment of its debts and liabilities, together with the costs of this action; and that such further or other judgment be rendered as may be just and equitable.

G. H., Attorney-General.

§ 7059. Complaint by private person for usurpation of elective local office.

Form No. 1878.

The People of the State of . . . ,	}
upon the relation of A. B.,	
Plaintiff,	
v.	
C. D.,	}
Defendant.	

The plaintiff [or, relator], who brings this action in the name of the state, complaining of the defendant, respectfully alleges:

I. That at a general [or, municipal] election, duly called and held in the county of . . . [or, city; or, town], pursuant to law, on the . . . day of . . . , 19.., for the election, among other officers, of a [name office] for the term of . . . years from . . . 19.., there were duly cast [state number, as: two thousand and forty-five (2,045)] legal votes for said office for the relator, and [state number] legal votes and no more for the defendant, and that there were no other legal votes cast for said office at said election, and that the relator was thereby duly elected to said office.

II. That notwithstanding the fact that the relator was legally and duly elected to said office as aforesaid, the canvassing board of said county [or, city; or, town], on the . . . day of . . . , 19.., proceeded to canvass said returns and to make a statement thereof, and erroneously and illegally determined thereby that the said C. D. had received . . . legal votes, and the said A. B. but . . . legal votes, and unlawfully determined that the said C. D. had received the greatest number of votes and was elected to said office of . . . , and thereupon, and on said day, unlawfully made out and

delivered to said C. D. an illegal certificate of election to the effect that said C. D. had received the greatest number of votes for said office and was duly elected thereto.

III. That in truth and in fact the said A. B. received the greatest number of legal votes cast for said office at said election; that forty-five of the votes so counted for the said C. D. were illegally cast by persons not entitled to vote at said election, to-wit:

In the town of . . . [or, in the . . . ward], one of the election districts of said county [or, city], E., F., and G., whose votes were cast and counted for the defendant, were minors under the age of twenty-one years, and X., Y., [etc.], whose votes were so cast and counted, were not at the time of casting said votes duly qualified electors, but were persons of foreign birth who were not citizens of the United States or of the state of . . . , and had never been naturalized by their own act or by the act of their parents, and had never declared their intention to become citizens of the United States.

In the town of . . . [or, in the said . . . ward], one of the election districts of said county [or city], L., M., N., [etc.], whose votes were so cast and counted, were not at the time entitled to vote in said election district, as they did not in fact actually reside in said district, and never had resided therein.

[Allege any other illegal votes cast for defendant, giving names and grounds of illegality specifically.]

[If the relator has qualified for office, set forth the facts as follows:]

IV. That on the . . . day of . . . , 19.., the said relator duly qualified as such . . . , by taking and subscribing the oath of office as required by the constitution and laws of this state, and filing the same with O. P., and by duly executing the official bond, with sureties, in manner, form, and substance as required by law, in the sum of . . . dollars.

V. That on the . . . day of . . . , 19.., the said defendant usurped and intruded into the said office of . . . of said county [or, city], and has ever since unlawfully exercised the same and excluded the relator therefrom, and withheld, and still withholds, the same and the fees and emoluments thereof from him.

Wherefore, the plaintiff demands judgment that the said C. D. be adjudged guilty of usurping, intruding into, and unlawfully holding said office, and that he be excluded from the same and the privileges and franchises thereof; that the said A. B. be

entitled to have, hold, and exercise said office, by virtue of said election; that the plaintiff recover the costs of this action.

§ 7060. Complaint by taxpayer of village illegally incorporated against the village and its officers, challenging corporate existence of supposed village, and praying that alleged village officers be ousted.

Form No. 1879.

[Title and commencement as in form No. 1878.]

I. That the defendant [name alleged village] is a pretended village or municipal corporation, in the county of . . . , in said state, attempted to be organized under the laws of the state of . . . , but never in fact legally organized or existing, and that the defendants C. D., [etc., naming active officers] now claim to, and do in fact, exercise authority as such village officers, levying taxes, taking charge of highways, and otherwise usurping full power and authority as such village officers within the territory hereinafter described.

II. That the relator is a resident within the limits of said alleged village, and owns real estate and is a taxpayer within the said territory over which the said last-named defendants are wrongfully exercising the powers of village officers as aforesaid.

III. That [here set forth the steps taken to incorporate the said supposed village, and allege specifically the defects in the proceedings which render the attempted incorporation void; if the defect be that there were illegal votes cast at the election called to decide the question, the number of votes cast for and against the proposition should be specifically stated, and the alleged illegal votes named].

IV. That at a pretended election held in said pretended village on the . . . day of . . . , 19.., the said defendants C. D., [etc., naming defendants] were in form elected officers of said village, to-wit: C. D., president; E. F., clerk; [name defendants and their respective offices]; and that each and all of said defendants thereafter in form qualified for their respective offices, and thereafter assumed, and now assume, to discharge the duties of village officers in said territory, and unlawfully usurp the power and authority to act as such officers; and that said defendants have and claim no other right or authority to act as such officers, nor has such pretended village any right or authority to exist as a village other than the right attempted to be conferred and acquired by the proceedings hereinbefore set forth.

V. That the relator, on the . . . day of . . . , 19.., and before the commencement of this action, made due application to the attorney-general of the state of . . . to commence an action of *quo warranto* against said pretended village and said pretended officers, but that said attorney-general refused, and still refuses, so to do.

Wherefore, plaintiff demands judgment, that said pretended village of . . . be adjudged an unlawful usurpation of village government; that said defendants C., D., [etc.], be adjudged to have unlawfully usurped their said pretended offices, and that they be ousted therefrom; and that plaintiff have such other judgment or relief as may be just, and for costs.

§ 7061. Complaint by taxpayer for usurpation of county office by person elected but not eligible.

Form No. 1880.

[TITLE.]

The above-named relator brings this action in the name of the state of . . . , against the above-named defendant, and for a complaint in this action alleges:

I. That the relator now is, and for more than two years prior to the commencement of this action, including all the times herein-after mentioned, has been, a resident, freeholder, taxpayer, and duly qualified elector and voter in . . . county, . . . , and now resides, and during all of said times resided, in the city of . . . , in said county, and now is, and during all of said times has been, a citizen of the United States and of the state of . . .

II. That on the . . . day of . . . , 19.., at a general election held in and for said county of . . . , pursuant to law, for the election, among other officers, of a county superintendent of schools of said county, for the term of two years from the . . . day of . . . , 19.., the said defendant received the greatest number of votes cast for said office, and that thereafter the canvassing board of said county proceeded to canvass the returns of said election from the various towns, wards, villages, and election districts, and determined that said defendant was elected to the said office of county superintendent, and thereupon issued a certificate of election to the effect that the defendant received the greatest number of votes for said office, and was elected to said office; that the said certification of election was delivered to said defendant, and thereafter, and on the first Monday of . . . , 19.., the said defendant attempted to qualify as such county superintendent, by taking and

subscribing the oath of office in the form required by law, and filing the same with the county clerk, and executed her official bond in the form required by law, and in the amount and with the sureties required by the county board of said county, and filed the same in the manner required by law.

III. That said defendant is not, and never has been, eligible to the office of county superintendent of schools, and was not eligible to said office at the time of her election; that she did not at said time, nor at any other time, hold a certificate entitling her to teach in any of the public schools in said state; that she did not at said time, nor at any other time, ever hold a state superintendent's certificate issued by the state superintendent after examination by and upon the recommendation of the board of examiners for state certificates, as required by law, and did not at that time, nor at any other time, ever hold any state superintendent's certificate of any kind whatever; that she had never held the office of county superintendent of schools on or prior to the . . . day of . . . , 19..

IV. That the name of said defendant was illegally placed upon the official ballot of said county as a candidate for the office of county superintendent of schools of said county at said election; that the defendant failed and neglected to file in the office of the county clerk of said county, ten days before the day of said election, or at any other time whatever, any proof whatever of having taught in any of the public schools of this state, or any copy of a certificate entitling her to teach in any of such schools, or any certificate known as a county superintendent's certificate, or any proof that she held the office of county superintendent of schools in this state on or before the . . . day of . . . , 19..; that said defendant failed and neglected to file in the office of the county clerk of said county any proof whatever that she held any certificate entitling her to teach in any of the schools in this state, or any copy of any such certificate, or any county superintendent's certificate, or any copy of any such certificate, or any proof whatever showing that she was entitled to hold said office, or was eligible thereto.

V. That on said first Monday of . . . , 19 . . . , the defendant usurped and intruded into the said office of county superintendent of said county, and has ever since unlawfully exercised the said office, and still holds the same, with the fees and emoluments thereof, and threatens to, and will, unless restrained by the court, collect, hold, and receive the fees and emoluments of said office.

Wherefore, the state, upon the complaint of the said relator, demands judgment against said defendant, that the said defendant be adjudged guilty of usurpation, by intruding into and unlawfully holding said office, and that she be excluded from the same, and from the privileges and franchises thereof; that she be required to return to the county all fees and moneys which she has received, or may receive, during the pendency of this action, by virtue of said office; and that the relator recover his costs in this action, together with such other and further relief as may be proper.

§ 7062. Judgment of ouster from office, in quo warranto action brought by rival claimant.

Form No. 1881.

[Recite trial, verdict, or findings, and continue:]

It is adjudged, that the defendant, C. D., has no right to the said office of [name office], and that he be ousted and excluded therefrom.

That the plaintiff [or, relator], A. B., is, and has been since the . . . day of . . . , 19.., entitled to the said office, by virtue of the election alleged in the complaint, and to the franchises, privileges, and emoluments thereof, and that he have and recover of the defendant, C. D., the sum of . . . dollars, his costs of this action.

It is further adjudged that the said defendant be fined the sum of [one thousand] dollars, which, when collected, shall be paid into the treasury of the state, in the manner provided by law.

By the Court:

O. P., Clerk.

§ 7063. Judgment in favor of incumbent, in same action.

Form No. 1882.

[Recite trial, verdict, or findings, and continue:]

It is adjudged, that the defendant, C. D., has not intruded into or usurped the office of [name office], but that, under and by virtue of the [appointment] in the complaint mentioned, he is entitled to hold such office and perform the duties thereof until the . . . day of . . . , 19..

§ 7064. Judgment ousting individuals from exercise of usurped corporate powers, in action of quo warranto brought on information of attorney-general.

Form No. 1883.

[Recitals of trial, verdict, findings, etc., and continue:]

It is therefore adjudged, that the said defendants, having acted within this state as a corporation, under the name of the . . . company, without being duly incorporated, be and they are hereby ousted and excluded from all corporate rights, privileges, and franchises under said corporate name so claimed and exercised by them.

[Add judgment for costs.]

CHAPTER CLVI.

MANDAMUS.

§ 7065. *In general.*—The writ of *mandamus* may be denominated the writ of mandate.¹ It confers no power and creates no duty.² A writ of mandate issues only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.³ And it does not lie to command a person to perform an act beyond that enjoined by law upon him as a duty pertaining to his office or position.⁴ It is a writ to be seldom issued, and then only when other writs may not issue, and other remedies are inadequate, and the acts complained of will be arbitrary, unlawful, and so unjust as to be tyrannical.⁵ It may be issued by any court, except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.⁶ It is now regarded, not as a prerogative writ, but in the nature of an action by the person in whose favor the writ is granted for the enforcement of a right in cases where the law affords him no other adequate means of redress.⁷ It is used merely to compel action, and coerce the performance of a pre-existing duty, where it was the plain duty of the respondent to act without its agency.⁸ Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of *mandamus* cannot rightly issue.⁹ But it will issue to compel the

1 Cal. Code Civ. Proc., § 1084.

2 *Sharpless v. Buckles*, 65 Kan. 838, 70 Pac. 886; *Territory v. Crum*, 13 Okla. 9, 73 Pac. 297.

3 *Peck v. Supervisors*, 90 Cal. 384, 27 Pac. 301; *Priet v. Reis*, 93 Cal. 25, 28 Pac. 798; *Hoffman v. Lewis*, 31 Utah, 179, 87 Pac. 167.

4 *Davis v. Porter*, 66 Cal. 658, 6 Pac. 746. See *Bright v. Farmers' etc.*

Co., 3 Colo. App. 170, 32 Pac. 433.

5 *State v. District Court*, 32 Mont. 579, 81 Pac. 345.

6 Cal. Code Civ. Proc., § 1085.

7 *Arberry v. Beavers*, 6 Tex. 457, 55 Am. Dec. 791.

8 *People v. Gilmer*, 5 Gilm. 242; *People v. Hatch*, 33 Ill. 140.

9 *State v. Board of Supervisors*, 2 Chand. (Wis.) 250.

exercise of discretion.¹⁰ The writ lies to a great extent within the sound discretion of the court where the application is made.¹¹

The writ is frequently granted where it can determine only one step in the progress of inquiry, and when it cannot finally settle or determine the controversy, as where canvassers of votes may be compelled to canvass the votes cast at an election and return the result, though it may be necessary to resort to other proceedings to determine the ultimate questions of right, and to procure admission to the office.¹² There must be an actual default or omission of duty before the writ can be granted, and this must be made to appear by the relator. An omission of duty cannot be anticipated. Threats or predetermination not to discharge the duty are not sufficient, if the time for performing the duty has not expired.¹³ A demand and refusal are not necessary, however, where the duties are of a public nature and affect the public at large; but where an individual claims the immediate and personal benefit of the act or duty, a demand and refusal are held necessary.¹⁴

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.¹⁵ By the "ordinary course of law" is not meant a common-law remedy only, but it includes all special or particular remedies provided by statute.¹⁶ Where an applicant for water has performed all of the acts and things required thereby to be done and performed by him, and the canal company has sufficient unsold water to supply applicant's demand, and refuses to do so, it may be compelled by writ of mandate to furnish such water.¹⁷ *Mandamus* is not the proper remedy when it appears that the purpose is to acquire a right to occupy or use the property of the other.¹⁸ So where another adequate remedy has been lost

¹⁰ *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630; *People v. District Court*, 14 Colo. 396, 24 Pac. 260.

¹¹ *Wiedwald v. Dodson*, 95 Cal. 450, 30 Pac. 580; *Ball v. Lappius*, 3 Or. 55; *Territory v. Potts*, 3 Mont. 364; *People v. Board of Canvassers*, 129 N. Y. 360, 29 Pac. 345, 14 L. R. A. 646; *Tennant v. Crocker*, 85 Mich. 328, 43 N. W. 577; *Territory v. Woodbury*, 1 N. Dak. 85, 44 N. W. 1077.

¹² *State v. County Judge of Marshall*, 7 Iowa, 186.

¹³ *Board of Commissioners v. County Commissioners*, 20 Md. 449; *State v. Carney*, 3 Kan. 88.

¹⁴ *Oroville etc. R. R. Co. v. Supervisors*, 37 Cal. 354.

¹⁵ Cal. Code Civ. Proc., § 1086.

¹⁶ *State v. Supervisors etc.*, 29 Wis. 79.

¹⁷ *Bardsly v. Boise City Irr. etc. Co.*, 8 Idaho, 155, 67 Pac. 428.

¹⁸ *Idaho Independent Tel. Co. v. Oregon Short Line Ry. Co.*, 8 Idaho, 175, 67 Pac. 318.

by neglect or delay, the writ will not be granted. The existence or non-existence of an adequate remedy at law, under the ordinary forms of legal procedure, is the test whether or not the writ shall issue.¹⁹ Though other remedies exist, if they are inadequate to afford the particular relief to which the party is entitled, the writ will issue.²⁰ The existence of an equitable remedy does not deprive a party of the legal remedy of *mandamus*.²¹ In one case the writ was sought to compel the sheriff to execute a writ of possession. The court said: "It is true, the relator might sue defendant on his bond for the damages resulting from the non-performance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy."²² So it is said the existence of equitable remedies does not affect the jurisdiction of courts of law to grant the writ of *mandamus*, although their existence may control their discretion in the matter.²³ It is well settled that the exercise of discretion cannot be controlled or directed by *mandamus*.²⁴ A judicial officer may be compelled to act, but the judgment or decision which he shall reach cannot be controlled. It is only where the act to be done, or the duty to be performed, is of a peremptory character, as distinguished from those which are discretionary, that this remedy will be granted. It issues to the judges of inferior courts wherever justice has been improperly delayed.²⁵ It may compel action, but cannot be used to correct the errors of an inferior court;²⁶ nor to restrain the performance of duties.²⁷ It is not the office of the writ to review judicial errors, and it will not lie to control the judgment of an officer or tribunal having discretionary or judicial functions.²⁸

¹⁹ Durham v. Monumental etc. Min. Co., 9 Or. 41; Slemmons v. Thompson, 23 Or. 225, 31 Pac. 514; Wood v. Strother, 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766; Tobey v. Hakes, 54 Conn. 274, 1 Am. St. Rep. 114, 7 Atl. 551; Collet v. Allison, 1 Okla. 42, 25 Pac. 516.

²⁰ See Fremont v. Crippen, 10 Cal. 215, 70 Am. Dec. 711.

²¹ Eby v. Board of Trustees, 87 Cal. 166, 25 Pac. 240.

²² See, also, Babcock v. Goodrich, 47 Cal. 488.

²³ People v. Mayor, 10 Wend. 395.

²⁴ State v. Malheur Co., 46 Or. 519, 81 Pac. 368.

²⁵ Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92.

²⁶ State v. Wright, 4 Nev. 119.

²⁷ Terry v. Stauffer, 17 La. Ann. 306.

²⁸ Jacobs v. Board of Supervisors, 100 Cal. 121, 34 Pac. 630; People v. Superior Court, 114 Cal. 466, 46 Pac. 383; People v. Graham, 16 Colo. 347, 26 Pac. 936; Greenwood etc. Land Co. v. Boutt, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1125, 15 L. B. A. 369.

§ 7066. **County officers.**—Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and, having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of *mandamus* is the proper legal remedy;²⁹ or to compel county commissioners to impanel a new jury to determine the location of a highway in a statutory case;³⁰ or to compel a county board of supervisors to subscribe to the capital stock of a corporation where they are directed so to do by the statute;³¹ but not to compel county commissioners to remove the county seat.³² It will be granted to compel an assessor to assess for taxation property liable to be taxed, and which he neglects or refuses to assess;³³ or to compel assessors to correct an erroneous assessment;³⁴ or to compel a tax-collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same;³⁵ or on behalf of one illegally assessed.³⁶ A *mandamus* will not lie against a county treasurer to compel him to pay interest due on county bonds.³⁷ But it will lie to compel a county auditor to pay a county debt.³⁸ So it will lie to compel the county auditor to give notice of the election of superior judges.³⁹ It will lie against a sheriff who refuses, upon a proper application, to remit a tax illegally assessed;⁴⁰ or to compel a sheriff to execute a writ of execution issued under a judgment rendered in a justice's court;⁴¹ or to compel him to restore possession of premises, ordered by the supreme court upon appeal to be delivered to a defendant, who has been wrongfully dispossessed

²⁹ Board of Commissioners v. Aspinwall, 24 How. 376, 16 L. Ed. 735; Robinson v. Supervisors, 43 Cal. 353. See, also, People v. Supervisors, 50 Cal. 563; Rose v. County Commissioners, 50 Me. 243.

³⁰ Mendon v. Worcester, 10 Pick. 236.

³¹ Napa Valley R. R. Co. v. Napa County, 30 Cal. 435.

³² Condit v. Board of Commissioners, 25 Ind. 422.

³³ People v. Shearer, 30 Cal. 645; Gorgas v. Blackburn, 14 Ohio, 252. But see Tillson v. Commissioners etc., 19 Ohio, 415; Hyatt v. Allen, 54 Cal. 353.

³⁴ People v. Olmsted, 45 Barb. 644.

³⁵ Perry v. Washburn, 20 Cal. 318.

³⁶ People v. Barton, 44 Barb. 148. As against commissioners of jurors, see People v. Taylor, 45 Barb. 129.

³⁷ People v. Fogg, 11 Cal. 351. See Bates v. Gerber, 82 Cal. 550, 22 Pac. 1115. Compare Meyer v. Porter, 65 Cal. 67, 2 Pac. 884.

³⁸ State v. Armstrong, 19 Ohio, 116. But see Burnet v. Auditor of Portage, 12 Ohio, 54.

³⁹ State v. Twichell, 4 Wash. 715, 31 Pac. 19.

⁴⁰ Smith v. King, 14 Or. 10, 12 Pac. 8.

⁴¹ North Pac. etc. R. R. Co. v. Gardner, 79 Cal. 213, 21 Pac. 735. See Habersham v. Sears, 11 Or. 431, 50 Am. St. Rep. 481, 5 Pac. 208.

by the agency of the superior court.⁴² It will lie to compel the clerk of the superior court to transmit a transcript on appeal which he withholds upon the ground that the appeal-bond is defective.⁴³

§ 7067. **Governor of state.**—*Mandamus* will issue to the governor in certain cases.⁴⁴ A writ of mandate will be issued to compel the governor to sign a patent, unless the law has vested him with discretionary power in that respect; so as to land embraced in a sixteenth and a thirty-sixth section, not surveyed by the United States.⁴⁵ When a ministerial duty affecting a private right is specially devolved on the governor by law, which the legislature might have devolved on any other state officer, he may be compelled to perform the same by a writ of mandate.⁴⁶

In Maryland, *mandamus* lies to compel the governor to issue a commission to which the petitioner is entitled under the state constitution, that being a ministerial act.⁴⁷ The supreme court has no authority to issue a *mandamus* to compel a governor of a state to return to another state a fugitive from justice.⁴⁸

§ 7068. **Government.**—If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptioner without payment would have no right which he could enforce against the government. He would have no action for damages, and could not compel the issuing of a patent by *mandamus*.⁴⁹ Where a county treasurer has been presented with a transcript of a judgment of the probate court allowing the person named to purchase school lands, and has received an installment of the price, and has issued his receipt therefor, *mandamus* will lie to compel him to accept and receipt for an installment of the price to another, who presents a proper transcript to pur-

⁴² *Quan Wo Chung v. Laumeister*, 83 Cal. 384, 17 Am. St. Rep. 261, 23 Pac. 320.

⁴³ *State v. Armstrong*, 5 Wash. 123, 31 Pac. 427.

⁴⁴ *People v. Brooks*, 16 Cal. 11.

⁴⁵ *Middleton v. Low*, 30 Cal. 596.

⁴⁶ *Id.* See, also, *Greenwood etc. Land Co. v. Routt*, 17 Colo. 156, 31 Am. St. Rep. 284, 28 Pac. 1125, 15 L. R. A. 369; *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162. Compare

Hovey v. State, 127 Ind. 588, 22 Am. St. Rep. 663, 27 N. E. 175, 11 L. R. A. 763.

⁴⁷ *Magruder v. Swann*, 25 Md. 175. See *Magruder v. Tuck*, 25 Md. 217.

⁴⁸ *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717.

⁴⁹ *Hutton v. Frisbie*, 37 Cal. 475. See 8 Opinions Att.-Gen. 71; 10 Opinions Att.-Gen. 57; 11 Opinions Att.-Gen. 491. See, also, *Bower v. Higbee*, 9 Mo. 259.

chase the same lands and makes the tender, his duties being ministerial, and he being unauthorized to exercise judicial powers in the premises.⁵⁰ A writ of mandate may be issued to compel the admission of a party to the use of a right from which he is precluded by a person, in violation of official duty.⁵¹

§ 7069. Ministerial officers.—*Mandamus* may be resorted to to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under obligation to do the specific act.⁵² The recording by the county superintendent of schools, in a book kept by him for the purpose, of the description of the boundaries of a school district, is a ministerial duty, and may be enforced by *mandamus*.⁵³ The state board of canvassers, in the exercise of its power in canvassing election returns for the election of representatives in general assembly, cannot be controlled by *mandamus*.⁵⁴ If a law provides that every ordinance shall be signed by the mayor, with no veto power, such duty is ministerial, and may be compelled by *mandamus*.⁵⁵ A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale who refuses to pay the purchase money on the ground that he is entitled to it as the oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien.⁵⁶ The supreme court will not issue a *mandamus* to the clerks of the superior courts in the first instance.⁵⁷ A *mandamus* will not lie against the clerk of the superior court to compel him to issue execution on a money judgment rendered in the court of which he is clerk.⁵⁸ *Mandamus* will lie to compel the clerk of the common council to make publication of certain notices which it is his duty to publish.⁵⁹ Where a law requires a public officer to report all fees received by him, and he fails or refuses to do so, *mandamus* is the proper remedy.⁶⁰ A sheriff will not be compelled by *mandamus* to make return of an

⁵⁰ Scott v. Schwab, 70 Kan. 306, 78 Pac. 443.

⁵¹ State v. Callvert, 33 Wash. 380, 74 Pac. 573.

⁵² People v. Bell, 4 Cal. 177; People v. Hubbard, 22 Cal. 36; State v. Rotwitt, 15 Mont. 29, 37 Pac. 845.

⁵³ People v. Vanhorn, 20 Colo. App. 215, 77 Pac. 978.

⁵⁴ Orman v. People, 18 Colo. App. 302, 71 Pac. 430.

⁵⁵ State v. Taylor, 36 Wash. 607, 79 Pac. 286; State v. Nichols, 38 Wash. 309, 80 Pac. 462.

⁵⁶ Williams v. Smith, 6 Cal. 91.

⁵⁷ Cowell v. Buckelew, 14 Cal. 640.

⁵⁸ Goodwin v. Glazer, 10 Cal. 333.

⁵⁹ Washington v. Page, 4 Cal. 388. But see People v. Board of Supervisors, 27 Cal. 655.

⁶⁰ Finley v. Territory, 12 Okla. 521, 73 Pac. 273.

execution which he has been instructed by the court to withhold till the termination of another case.⁶¹ It will lie to compel a town clerk to deliver the town record to his successor.⁶² If an official duty is to be performed by an officer on the happening of a certain event, he cannot capriciously refuse to perform it on the plea that he is not satisfied that it has happened. If the fact exists, and it is established by proof, it is his legal duty to be satisfied and perform the act, and *mandamus* will lie.⁶³

§ 7070. **Municipal corporations.**—Boards of supervisors and bodies like them, without any legislative provision by general law, are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them.⁶⁴ Where the board of supervisors act ministerially in the issuance of bonds under act of the legislature, *mandamus* lies if they improperly refuse.⁶⁵ So as to the issue of stock.⁶⁶ So where the board of supervisors of a county are empowered to subscribe for the county to the capital stock, and may be compelled to subscribe by writ of mandate.⁶⁷ Where it is their duty to provide for the payment of judgments, they must either appropriate for this purpose money already in the treasury or they must raise the money by taxation;⁶⁸ and *mandamus* may compel such levy.⁶⁹ Where, however, they act in the exercise of their discretion, there is no authority to interfere with their determination; but when they act under mistake of law, the error may be corrected by *mandamus*, or any other proper proceeding.⁷⁰

Mandamus to the chief of police to prosecute gamblers will not be refused on the principle that an officer cannot be compelled to do what his superior officer has lawfully commanded him not to do.

⁶¹ *State v. Hartman*, 26 Wash. 524, 67 Pac. 223.

⁶² *Taylor v. Henry*, 2 Pick. 397; *Walter v. Belding*, 24 Vt. 658. See *Warner v. Myers*, 4 Or. 72; *State v. Johnson*, 30 Fla. 433, 11 South. 845, 18 L. R. A. 410; *Territory v. Shearer*, 2 Dak. 332, 8 N. W. 135; *Driscoll v. Jones*, 1 S. Dak. 8, 44 N. W. 726.

⁶³ *Stockton R. R. Co. v. City of Stockton*, 51 Cal. 328.

⁶⁴ *Hastings v. City etc. San Francisco*, 18 Cal. 49; *Alden v. Alameda County*, 43 Cal. 270.

⁶⁵ *California etc. R. R. Co. v. Butte County*, 18 Cal. 671.

⁶⁶ *People v. Common Council*, 45 Barb. 473.

⁶⁷ *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435.

⁶⁸ *People v. San Francisco*, 21 Cal. 668.

⁶⁹ *Von Hoffman v. City of Quincy*, 4 Wall. 535, 18 L. Ed. 403; *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419; *Coy v. Lyons City*, 17 Iowa, 1, 85 Am. Dec. 539; *Robinson v. Supervisors*, 43 Cal. 353.

⁷⁰ *Thomas v. Armstrong*, 7 Cal. 287; *Fall v. Paine*, 23 Cal. 302.

where they have entered into an unlawful conspiracy not to prosecute;⁷¹ but *mandamus* will not lie to compel a sheriff and a city marshal to enforce the laws and prosecute violators thereof, both because the thing sought to be accomplished is not sufficiently definite and because there is an adequate remedy, providing that any public officer willfully neglecting to prosecute offenders shall be guilty of misdemeanor, and punished by fine or removed from office.⁷² *Mandamus* does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff.⁷³ A *mandamus* to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account, and issue warrants accordingly.⁷⁴ *Mandamus* is the proper proceeding to try the question whether a board of supervisors have the power to approve a claim against a county,⁷⁵ or to compel a board to audit and allow the claims of county officers, etc.⁷⁶ But such writ does not control or prescribe the mode, or determine the result of their action.⁷⁷

§ 7071. Nature of remedy.—The object of the writ is not to supersede legal remedies, but to supply the want of them. The relator must therefore have a clear legal right to the performance of a particular act or duty at the hands of the respondent, and it must appear that the law affords no other adequate remedy to secure the enforcement of the right and the performance of the duty it is sought to coerce.⁷⁸ The writ of *mandamus* is the proper

71 State v. Williams, 45 Or. 314, 77 Pac. 965, 67 L. R. A. 166.

72 State v. Brewer, 39 Wash. 65, 109 Am. St. Rep. 858, 80 Pac. 1001.

73 People v. Supervisors, 14 Cal. 102. See Magee v. Board of Supervisors, 10 Cal. 376.

74 Tuolumne County v. Stanislaus County, 6 Cal. 440. As to law concerning intelligence offices, see People ex rel. Hall v. Supervisors, 20 Cal. 591.

75 People v. Supervisors, 28 Cal. 429.

76 People v. Supervisors, 32 N. Y. 473.

77 People v. Supervisors, 11 Cal. 42; Price v. Sacramento County, 6 Cal. 254.

78 Conro v. Port Henry Iron Co., 12 Barb. 27; People v. Green, 64 N.

Y. 499; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; Collier etc. Lithographing Co. v. Henderson, 18 Colo. 259, 32 Pac. 417; Bailey v. Lawrence Co., 2 S. Dak. 533, 51 N. W. 331; People v. Thompson, 25 Barb. 73; Tarver v. Commissioners etc., 17 Ala. 527; The King v. Nottingham Old Water Works, 6 Ad. & El. 355. That *mandamus* is a purely legal, civil proceeding, and no element of equity or application of equitable law is or can be involved, see Bright v. Reservoir Co., 3 Colo. App. 170, 32 Pac. 433; Young v. Wells, 97 Ind. 410; State v. Williams, 69 Ala. 311. That the statutes of North Dakota have assimilated the proceeding to a civil action, see State v. Carey, 2 N. Dak. 36, 49 N. W. 164. That it is considered to be a harsh remedy, and to

remedy to compel inferior tribunals to perform the duties required of them by law;⁷⁹ to compel judges to hold their courts, and county officers to keep their offices at a county seat.⁸⁰ It is not the appropriate remedy for orders made in a cause by a judge, in the exercise of his authority, although they may bear harshly upon the party; nor to compel any person, inferior officer, court, or corporation to act in any particular manner, when such person, officer, court, or corporation is invested with discretionary power.⁸¹ That discretion cannot be controlled by this writ; but if it refuses to exercise its discretion, a *mandamus* will lie to compel it to do so.⁸²

§ 7072. *Quo warranto*.—*Mandamus* may issue to restore a person to office from which he has been illegally removed;⁸³ or to compel the admittance of one to an office from which he is unlawfully excluded.⁸⁴ If a county judge refuses to appoint commissioners to appraise land, in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so.⁸⁵

§ 7073. *Corporate records*.—*Mandamus* may issue to enforce a stockholder's right to inspect the corporate books and records,

be substituted for the ordinary process only in extraordinary cases, see *State v. New Orleans etc. R. R. Co.*, 42 La. Ann. 138, 7 South. 226. See, also, *State v. Young*, 38 La. Ann. 923; *Blair v. Marye*, 80 Va. 485.

⁷⁹ *Carpenter v. Bristol*, 21 Pick. 258; *Commonwealth v. Justices etc. Hampden*, 2 Pick. 414.

⁸⁰ *Calaveras County v. Brockway*, 30 Cal. 325. As to *mandamus* to judges or in judicial proceedings, see *Scott v. Superior Court*, 75 Cal. 114, 16 Pac. 547; *Whaley v. King*, 92 Cal. 431, 28 Pac. 579; *Donahue v. Superior Court*, 93 Cal. 252, 28 Pac. 1043; *Strong v. Grant*, 99 Cal. 100, 33 Pac. 733; *State v. Hunter*, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294; *Brown v. Kalamazoo Circuit Judge*, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827, 5 L. R. A. 226; *Mansfield v. First Nat. Bank*, 6 Wash. 603, 34 Pac. 143; *Tomkin v. Harris*, 90 Cal. 201, 27 Pac. 202; *State v. Van Ness*, 15 Fla. 317; *Reversed in State v. Young*, 31 Fla. 594, 34 Am. St. Rep. 41, 12 South. 673, 19 L. R. A. 636;

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667.

⁸¹ *People v. Bell*, 4 Cal. 177; *People v. Hubbard*, 22 Cal. 34; *People v. Weston*, 28 Cal. 640, and authorities there cited; *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110; *Ex parte Whitney*, 13 Pet. 404, 10 L. Ed. 221; *Gaines v. Relf*, 15 Pet. 9, 10 L. Ed. 642; *People v. District Court*, 18 Colo. 26, 31 Pac. 339.

⁸² *People v. Supervisors*, 12 Barb. 446; *Commonwealth v. The Judges etc.*, 3 Binn. (Pa.) 273; *Roberts v. Holsworth*, 5 Halst. (N. J. L.) 57; *Jacobs v. Board of Supervisors*, 100 Cal. 121, 34 Pac. 630.

⁸³ *Singleton v. Commissioners*, 2 Bay (S. C.), 105; *Dew v. Judges*, 3 Hen. & M. 1, 3 Am. Dec. 639; *Street v. Gallatin County Commissioners*, Breese, 50.

⁸⁴ *Strong, Petitioner*, 20 Pick. 484. See *Kelly v. Edwards*, 69 Cal. 460, 11 Pac. 1.

⁸⁵ *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102.

though the answer sets up improper motives and a desire to injure the business.⁸⁶

§ 7074. Religious corporations.—A *mandamus* may issue to compel a religious corporation to admit a minister to the pulpit;⁸⁷ but not to restore a minister to his clerical rights and functions, where there are no fees or emoluments attached to his office.⁸⁸ It may issue to compel the clerk or treasurer of a religious society to deliver the records to his successor.⁸⁹

§ 7075. State officers.—The writ will issue to compel the secretary of the state of Louisiana to affix his official signature.⁹⁰ But it will not compel the secretary of state to certify a bill or an enrolled act to be a law which is not among the archives of his office.⁹¹ It may issue to compel a secretary of state to deliver a commission.⁹² Where it was the duty of the controller to have issued warrants upon the treasury for the sums claimed under a state prison contract, the performance of this can be enforced by *mandamus*.⁹³ A *mandamus* may issue to compel the controller of state to account to a member of the legislature for the daily compensation fixed by law.⁹⁴ As no action can be maintained against the state, the court will not permit a claim to be enforced circuitously by *mandamus* against the treasurer.⁹⁵ *Mandamus* may issue to compel the speakers of two houses to issue a certificate of election.⁹⁶

⁸⁶ Johnson v. Langdon, 135 Cal. 624, 87 Am. St. Rep. 156, 67 Pac. 1050.

⁸⁷ Runkel v. Winemiller, 4 Har. & M. 459; People v. State, 1 Edm. 505.

⁸⁸ Union Church v. Sanders, 1 Houst. (Del.) 100, 63 Am. Dec. 187. See Sale v. First Regular Baptist Church, 62 Iowa, 26, 49 Am. Rep. 136, 17 N. W. 143.

⁸⁹ St. Luke's Church v. Slack, 7 Cush. 226. As to *mandamus* to enforce acts by private corporations generally, see People v. New York etc. R. R. Co., 17 Abb. N. C. 304, 104 N. Y. 58, 9 N. E. 856; State v. Chicago etc. R. R. Co., 29 Neb. 412, 45 N. W. 469; County of Fresno v. Fowler etc. Canal Co., 68 Cal. 359, 9 Pac. 309; Combs v. Agricultural Ditch Co., 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966.

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⁹⁰ State v. Wrotnowski, 17 La. Ann. 156.

⁹¹ People v. Hatch, 33 Ill. 9.

⁹² Marbury v. Madison, 1 Cranch, 137, 2 L. Ed. 60.

⁹³ People v. Brooks, 16 Cal. 11; Page v. Hardin, 8 B. Mon. (Ky.) 648. See Patty v. Colgan, 97 Cal. 251, 31 Pac. 1133, 18 L. R. A. 744.

⁹⁴ Fowler v. Peiree, 2 Cal. 165.

⁹⁵ Weston v. Dane, 51 Me. 461.

⁹⁶ State v. Moffitt, 5 Ohio, 358. See State v. Elder, 31 Neb. 169, 47 N. W. 710, 10 L. R. A. 796. As to *mandamus* to compel the holding of an election, see People v. Common Council, 85 Cal. 369, 24 Pac. 727; Gibbs v. Bartlett, 63 Cal. 117; Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580. As to *mandamus* to control canvassing board, see Page v. Board of Super-

§ 7076. **Alternative writ.**—When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance.⁹⁷

§ 7077. **Jurisdiction.**—The power to issue the writ of *mandamus* is generally confided to the highest court of original jurisdiction.⁹⁸ It cannot be issued by a court having only appellate powers.⁹⁹ A superior court will never prescribe how the discretion of an inferior tribunal shall be exercised; but will in proper cases require an inferior court to decide;¹⁰⁰ or it may require an inferior court to proceed to judgment.¹⁰¹ In the exercise of its ordinary appellate jurisdiction, the supreme court can take cognizance of no case until a final judgment or decree shall have been made in the inferior court.¹⁰² The supreme court of California, under the constitution, has original jurisdiction in cases of *mandamus*.¹⁰³ The supreme court of California has no jurisdiction by its writ of mandate, when directed to a person who acts in his judicial or deliberative capacity, except to compel a performance of his official duty by acting and deciding in the premises to the best of his judgment.¹⁰⁴ The constitution of California confers upon the superior courts original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*,¹⁰⁵ regardless of the

visors, 85 Cal. 50, 24 Pac. 607; *Darrow v. People*, 8 Colo. 417, 8 Pac. 661; *Rosenthal v. Board of Canvassers*, 50 Kan. 129, 32 Pac. 129; *Territory v. Board of Commissioners*, 4 N. Mex. 204, 16 Pac. 855.

⁹⁷ Cal. Code Civ. Proc., § 1088. See *Wilson v. Hunt* (Cal.), 16 Pac. 305.

⁹⁸ *Kendall v. United States*, 12 Pet. 524, 9 L. Ed. 1181; affirming *United States v. Kendall*, 5 Cranch C. C. 163, Fed. Cas. No. 15517. See, also, as to the power to issue the writ, *State v. Canvassers*, 13 Mont. 23, 31 Pac. 879; *State v. Smith*, 6 Wash. 496, 33 Pac. 974; *People v. County Commissioners*, 12 Colo. 89, 19 Pac. 892; *State v. Nelson County*, 1 N. Dak. 88, 26 Am. St. Rep. 609, 45 N. W. 33, 8 L. R. A. 283.

⁹⁹ *Howell v. Crutchfield, Hempst.*

99, Fed. Cas. No. 6778a. For the extent of the power of the circuit court to issue writs of *mandamus*, see *McIntire v. Wood*, 7 Cranch, 504, 3 L. Ed. 420; *Ex parte Hennen*, 13 Pet. 225, 10 L. Ed. 136; *Knox County v. Aspinwall*, 24 How. 376, 16 L. Ed. 735; *Smith v. Jackson*, 1 Paine, 453, Fed. Cas. No. 13064.

¹⁰⁰ *Life etc. Ins. Co. of N. Y. v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

¹⁰¹ *Life etc. Ins. Co. of N. Y. v. Adams*, 9 Pet. 573, 9 L. Ed. 233.

¹⁰² *Id.*

¹⁰³ *Tyler v. Houghton*, 25 Cal. 26; *People v. Weston*, 28 Cal. 639, and authorities there cited.

¹⁰⁴ *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283.

¹⁰⁵ *Perry v. Ames*, 26 Cal. 381; affirmed in *Courtwright v. Bear River etc. Water etc. Co.*, 30 Cal. 583.

amount involved.¹⁰⁶ The superior court may issue a writ of *mandamus* to run out of the county, or to be executed out of the county in which the court is held, there being nothing in the state constitution restricting the jurisdiction of the court to the county in which it is held.¹⁰⁷ Under the California constitution of 1849, county courts had no jurisdiction to issue *mandamus*, nor could it be conferred on them by statute, as it is not a "special case" within the meaning of that term in the constitution, and an act of the legislature which attempted to confer such power is therefore unconstitutional;¹⁰⁸ but in Colorado, they do have jurisdiction to issue the writ.¹⁰⁹ In Oklahoma, power to issue the writ is vested in the supreme and district courts,¹¹⁰ but not in the probate courts.¹¹¹ A state court has no jurisdiction to issue a *mandamus* to an officer commissioned by the United States; his conduct can only be controlled by the powers that created the office.¹¹²

§ 7078. Time to sue out writ.—The right to *mandamus* to compel reinstatement as a policeman was lost by laches, where the proceedings were not instituted for seven years after petitioner's dismissal.¹¹³ Where parties in interest promptly took an appeal from an order of the superior court refusing to entertain a motion to modify an order previously entered setting apart a homestead from the property of a decedent, which appeal was dismissed on the ground that the order was not appealable, whereupon the appellants at once instituted proceedings in *mandamus* within a year after the order was entered, there was not such laches as to bar their right to maintain such proceedings.¹¹⁴ An objection that the proceeding is prematurely brought is waived by counsel of respondent appearing and asking that the rights of the parties be adjudicated.¹¹⁵ The writ is never awarded in anticipation of a supposed omission of duty.¹¹⁶

¹⁰⁶ *Cariaga v. Dryden*, 30 Cal. 244.

¹⁰⁷ *Kings County v. Johnson*, 104 Cal. 198, 37 Pac. 870.

¹⁰⁸ *People v. Supervisors*, 45 Cal. 679; *Wilecox v. City of Oakland*, 49 Cal. 31.

¹⁰⁹ *Mann v. People*, 16 Colo. App. 475, 66 Pac. 452.

¹¹⁰ *Wilson's Rev. Stats.* 1903, § 69.

¹¹¹ *Starkweather v. Kemp*, 18 Okla. 28, 88 Pac. 1045.

¹¹² *McClung v. Silliman*, 6 Wheat. 598, 5 L. Ed. 340.

¹¹³ *Jones v. Board of Police Commissioners*, 141 Cal. 96, 74 Pac. 696; *Dodge v. Board of Police Commissioners*, 1 Cal. App. 608, 82 Pac. 699.

¹¹⁴ *Cahill v. Superior Court*, 145 Cal. 42, 78 Pac. 467.

¹¹⁵ *State v. Weston*, 31 Mont. 218, 78 Pac. 487.

¹¹⁶ *Hardin v. Guthrie*, 26 Nev. 246, 66 Pac. 744.

A schoolteacher's right to reinstatement as a teacher, after wrongful dismissal, is governed by statute;¹¹⁷ and an action of *mandamus* therefor must be instituted within three years after accrual.¹¹⁸ Six months after abandonment of work is a proper time to allow county commissioners to make a special assessment to pay off warrants issued on public work.¹¹⁹

§ 7079. **When writ may issue.**—The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law,¹²⁰ and only in cases where the act to be done is ministerial.¹²¹ When the effect of the application is to bring under review the decision of a superior court, the appellate jurisdiction given by the constitution attaches, and may be exercised by the means of the writ of *mandamus*.¹²² So it may issue to compel a court to certify a case to the circuit court of the United States.¹²³ It is the only adequate mode of relief where an inferior tribunal refuses to act upon a subject brought properly before it.¹²⁴ The supreme court has the right to compel inferior tribunals to proceed to hear and determine cases of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect.¹²⁵ An order made in an action pending in the district court, staying all proceeding therein until the further direction of the court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the court to proceed.¹²⁶ So of an order expelling certain attorneys from the bar, on the

¹¹⁷ Cal. Pol. Code, § 1793.

¹¹⁸ Cal. Code Civ. Proc., § 338, subd. 1; *Harby v. Board of Education*, 2 Cal. App. 418, 83 Pac. 1081.

¹¹⁹ *Espy v. Board of Commissioners*, 40 Wash. 67, 82 Pac. 129.

¹²⁰ Cal. Code Civ. Proc., § 1086; *Merced Min. Co. v. Fremont*, 7 Cal. 130; *Robertson v. Board of Library Trustees*, 136 Cal. 403, 69 Pac. 88; *State v. Ledwidge*, 27 Mont. 197, 70 Pac. 511; *State v. Daggett*, 28 Wash. 1, 68 Pac. 340; *State v. Gardner*, 32 Wash. 550, 98 Am. St. Rep. 858, 73 Pac. 690; *Holtum v. Greif*, 144 Cal. 521, 78 Pac. 11; *State v. Tallman*, 29 Wash. 317, 69 Pac. 1101.

¹²¹ *Draper v. Noteware*, 7 Cal. 276; *United States v. Guthrie*, 17 How. 284, 15 L. Ed. 102; *United States v.*

Seaman, 17 How. 225, 15 L. Ed. 226; *American Insurance Co. v. Fyler*, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; *United States v. Black*, 128 U. S. 40, 9 Sup. Ct. 12, 32 L. Ed. 354.

¹²² *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295.

¹²³ See *Spraggin v. County Court of Humphries*, 1 Cooke, 160. But see, in certain cases, *Ladd v. Tudor*, 3 Woodb. & M. 325, Fed. Cas. No. 7975.

¹²⁴ *Life etc. Ins. Co. of New York v. Wilson*, 8 Pet. 291, 8 L. Ed. 949.

¹²⁵ *Purcell v. McKune*, 14 Cal. 231; *Smith v. Jackson*, 1 Paine, 453, Fed. Cas. No. 13064; *Matter of Turner*, 5 Ohio, 542, 544.

¹²⁶ *Rhodes v. Craig*, 21 Cal. 419;

ground that they had set at defiance the authority of the court;¹²⁷ a *mandamus* is the proper remedy to compel their restoration.¹²⁸

Where the act of signing a judgment is merely ministerial, a *mandamus* may issue requiring the judge of an inferior court to do it.¹²⁹ So upon an affidavit showing that the judge has neglected or refused to enter judgment,¹³⁰ to enter judgment on the report of a referee,¹³¹ or to compel a justice of the peace to enter a judgment of discontinuance.¹³² So *mandamus* will lie to compel a justice of the peace to issue an order to compel a garnishee to appear and testify under oath.¹³³ But when the act to be done is judicial or discretionary, the writ will not direct what decision shall be made; nor will it be granted after the inferior tribunal has acted, for the purpose of reviewing the legality of its decision.¹³⁴ A *mandamus* may issue to compel a judge to settle a bill of exceptions first, and then to sign it;¹³⁵ or a statement on motion for a new trial;¹³⁶ or to set aside the grant of a new trial.¹³⁷ But he cannot be so compelled after the expiration of his term of office.¹³⁸ A peremptory writ of *mandamus* is a proper remedy to enforce delivery of books, papers, etc., to a newly elected judge of probate.¹³⁹

Where, pending a motion for a new trial in the district court, the defendants violate an injunction previously issued by said district court, the supreme court will issue a *mandamus* against the judge of such district court to compel him to issue his attachment for contempt.¹⁴⁰ A *mandamus* will issue from a superior to an inferior court to compel the issuance of an attachment for con-

People v. District Court, 14 Colo. 396, 24 Pac. 260.

127 People v. Turner, 1 Cal. 143, 52 Am. Dec. 295.

128 Id.; Herrington v. Sawyer, 36 Cal. 289; State v. Sachs, 2 Wash. 373, 26 Am. St. Rep. 857, 26 Pac. 865; State v. Finley, 30 Fla. 302, 11 South. 500. See Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214; People v. Justices of Delaware, 1 Johns. Cas. 181; Withers v. State, 36 Ala. 252.

129 Life etc. Ins. Co. of New York v. Wilson, 8 Pet. 291, 8 L. Ed. 949.

130 Bradstreet v. Cooper, 6 Pet. 774, 8 L. Ed. 577.

131 In this case there was no remedy by appeal. See Russell v. Elliott, 2 Cal. 245.

132 Anderson v. Pennie, 32 Cal. 265.

133 State v. Eddy, 10 Mont. 311, 25 Pac. 1032.

134 People v. Sexton, 24 Cal. 78.

135 People v. Lee, 14 Cal. 512; People v. Judges, 1 Caines, 511; State v. Sheldon, 2 Kan. 322; State v. Todd, 4 Ohio, 351. See Thornton v. Hoge, 84 Cal. 231, 23 Pac. 1112.

136 People v. Rosborough, 29 Cal. 415; State v. Murphy, 19 Nev. 89, 6 Pac. 840; Whitmore v. Harris, 10 Utah, 259, 37 Pac. 464.

137 People v. Superior Court, 10 Wend. 285.

138 Leach v. Aitken, 91 Cal. 484, 28 Pac. 777. See, also, Coffey v. Grand Council, 87 Cal. 367, 25 Pac. 547.

139 Crowell v. Lambert, 10 Minn. 369.

140 Ortman v. Dixon, 9 Cal. 23;

tempt, where the proceeding is, in substance, a private right, though in form of a case of contempt.¹⁴¹ The court may grant a peremptory *mandamus* to compel a district judge to execute a sentence pronounced by him, although subsequently to its rendition an act of the legislature of the state comprising the district was passed, authorizing the governor of the state to prevent its execution.¹⁴²

Mandamus is the proper proceeding to compel an officer to pay warrants drawn on a special fund when such officer refuses to pay.¹⁴³ Or to compel the mayor of a city to sign bonds.¹⁴⁴ But it will not lie in California to compel payment of money out of a fund which the law does not allow to be applied to the use sought.¹⁴⁵ It is the proper remedy to restore a teacher in the public schools to a right given by express law, from which he is unlawfully precluded;¹⁴⁶ or to reinstate a pupil wrongfully excluded.¹⁴⁷ It is the proper remedy to reinstate an appeal,¹⁴⁸ or to compel an original hearing in a chancery suit.¹⁴⁹ If a board of county commissioners has fixed licenses under a wrong statute, *mandamus* will lie to compel it to fix them under the right statute.¹⁵⁰

§ 7080. When it will not issue.—A *mandamus* will not lie where a party may have a remedy by a writ of error,¹⁵¹ as on an order punishing for contempt;¹⁵² nor where there is any other specific, speedy, and adequate remedy,¹⁵³ and one competent to

Merced Min. Co. v. Fremont, 7 Cal. 130.

141 Merced Min. Co. v. Fremont, 7 Cal. 130.

142 United States v. Peters, 5 Cranch, 115, 3 L. Ed. 53.

143 Hockaday v. Commissioners, 1 Colo. App. 362, 29 Pac. 287. See McCaughy v. Jackson, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863.

144 Chalk v. White, 4 Wash. 156, 29 Pac. 979.

145 Priet v. Reis, 93 Cal. 85, 28 Pac. 798. As to *mandamus* to board of education, see Raisch v. Board of Education, 81 Cal. 542, 22 Pac. 890; Eby v. School Trustees, 87 Cal. 166, 25 Pac. 240; State v. School District, 31 Neb. 552, 48 N. W. 393; Wintz v. Board of Education, 28 W. Va. 227.

146 Kennedy v. Board of Education, 82 Cal. 483, 22 Pac. 1042; Morley v. Power, 73 Tenn. 691.

147 Perkins v. Directors, 56 Iowa, 476, 9 N. W. 356.

148 State v. District Court, 13 Mont. 370, 34 Pac. 298.

149 Brown v. Circuit Judge, 75 Mich. 274, 13 Am. St. Rep. 438, 42 N. W. 827, 5 L. R. A. 226.

150 Territory v. McPherson, 6 Dak. 27, 50 N. W. 351.

151 United States v. Addison, 22 How. 174, 16 L. Ed. 304; Commissioner of Patents v. Whiteley, 4 Wall. 522, 18 L. Ed. 335; Aldrich v. Superior Court, 135 Cal. 12, 66 Pac. 846; People v. District Court, 32 Colo. 166, 75 Pac. 390; State v. Second Judicial District Court, 26 Mont. 274, 67 Pac. 625; State v. District Court, 26 Mont. 372, 68 Pac. 465; State v. Tallman, 29 Wash. 317, 69 Pac. 1101.

152 People v. Turner, 1 Cal. 152.

153 Crandall v. Amador County, 20 Cal. 72; People v. Olds, 3 Cal. 175, 58 Am. Dec. 398; Louisville B. R. Co.

afford relief upon the very subject-matter;¹⁵⁴ nor will it lie if the right of the party applying therefor is not clear.¹⁵⁵ The general rule that a *mandamus* will not lie where the party has another remedy must be understood to refer to some specific remedy which will place the party in the same situation in which he was before the act complained of,¹⁵⁶ as where there is a remedy by appeal to compel the entry of a decree on the report of a referee;¹⁵⁷ so from an order denying the trebling of damages in forcible entry and detainer;¹⁵⁸ so where a court refuses to enter judgment for costs,¹⁵⁹ or a judgment of dismissal.¹⁶⁰ A claim to a writ of *mandamus* cannot be sustained if there is any other equally effectual remedy.¹⁶¹ The writ will not be allowed to usurp the office of a writ of error; nor will it be made use of to anticipate an erroneous decision by a subordinate court.¹⁶² *Mandamus* will not lie to compel a court to proceed with the trial after an order changing the place of trial; or where the district court refuses to transfer an indictment to another district court for trial;¹⁶³ nor to command him to recall an order after final judgment, if an appeal could be taken;¹⁶⁴ nor to compel a circuit judge to vacate an order;¹⁶⁵ nor where a court refuses to proceed for want of a statement, in a chancery case;¹⁶⁶ nor for refusal or allowance of a change of venue;¹⁶⁷ nor to rein-

v. State, 25 Ind. 177, 87 Am. Dec. 358; *Dorrington v. Board of Supervisors*, 8 Ariz. 4, 68 Pac. 541; *Williams v. Bagnelle* (Cal.), 70 Pac. 1058; reversed in 138 Cal. 699, 72 Pac. 408; *State v. Wright*, 26 Mont. 540, 91 Am. St. Rep. 421, 69 Pac. 101; *State v. District Court*, 27 Mont. 280, 70 Pac. 981; *Quaker City Nat. Bank v. City of Tacoma*, 27 Wash. 259, 67 Pac. 710; *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534.

¹⁵⁴ *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711.

¹⁵⁵ *United States v. Bank of Alexandria*, 1 Cranch C. C. 7, Fed. Cas. No. 14514; *State v. Justices of Moore*, 2 Ired. (N. C.) 430; *People v. Spruance*, 8 Colo. 307, 6 Pac. 831; *State v. Hunter*, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294; *People v. President etc. Brooklyn*, 1 Wend. 318, 19 Am. Dec. 502.

¹⁵⁶ *Etheridge v. Hall*, 7 Port. (Ala.) 47; *People v. Supervisors*, 12

Barb. 217; *Tarver v. Commissioners*, 17 Ala. 527; *James v. Buck's County Commissioners*, 13 Pa. St. 72.

¹⁵⁷ *Ludlum v. Fourth District Court*, 9 Cal. 12. See *People v. Superior Court*, 114 Cal. 466, 46 Pac. 383; *State v. Allen*, 8 Wash. 168, 35 Pac. 609.

¹⁵⁸ *Early v. Mannix*, 15 Cal. 149.

¹⁵⁹ *Peralta v. Adams*, 2 Cal. 594.

¹⁶⁰ *People v. Pratt*, 28 Cal. 166, 87 Am. Dec. 110. See *In re Spring Valley Water Works*, 17 Cal. 132.

¹⁶¹ *Bush v. Beavan*, 1 Hurl. & Colt. 500.

¹⁶² *People v. Judge etc.*, 18 Colo. 500, 33 Pac. 162; *People v. Clerk etc.* 22 Colo. 280, 44 Pac. 506.

¹⁶³ *People v. Judge of Twelfth District*, 17 Cal. 547.

¹⁶⁴ *People v. Moore*, 29 Cal. 427.

¹⁶⁵ *State v. Taylor*, 19 Wis. 566. See, generally, *State v. Carney*, 3 Kan. 88.

¹⁶⁶ *Purcell v. McKune*, 14 Cal. 230

¹⁶⁷ *People v. Hubbard*, 22 Cal. 34

state a case when the appeal has been dismissed, even if the court acted erroneously in dismissing it.¹⁶⁸ In a matter in which the county court has final jurisdiction and acts, there is no remedy, even if it acts erroneously,¹⁶⁹ as in the entering of judgment,¹⁷⁰ or the filling of a blank in a judgment with the amount of costs, after judgment was affirmed by the supreme court.¹⁷¹

The supreme court will not issue a *mandamus* to compel a superior judge to decide contrary to his own judgment; nor to compel a judge to issue a warrant of arrest in a particular case;¹⁷² nor to re-examine a decision on the sufficiency of the affidavit to hold to bail;¹⁷³ nor to compel a district court to expunge amendments improperly made in the record returned to the circuit court on a writ of error;¹⁷⁴ nor to compel a judge to allow a defendant to take possession of goods provisionally seized, upon his depositing in court a sum to be fixed by the judge;¹⁷⁵ nor to compel a district court to review its judgment;¹⁷⁶ nor to permit an allowance of double pleas;¹⁷⁷ nor to permit the intervention of new parties;¹⁷⁸ nor will it compel a court to withdraw an issue, and direct a new issue to be made up.¹⁷⁹ It will not be issued to admit a person to an office while another holds it under color of right.¹⁸⁰ If an office is filled *de facto*, it will not lie for the purpose of trying title to it.¹⁸¹

Mandamus will not lie to enforce private contracts.¹⁸² It will not lie to compel the board of medical examiners to issue a certificate to practice medicine to an applicant whose demand has been refused.¹⁸³ It is never awarded to aid in the collection of an illegal claim.¹⁸⁴ The writ may issue where a question of title

¹⁶⁸ *People v. Weston*, 28 Cal. 639;
Lewis v. Barclay, 35 Cal. 213.

¹⁶⁹ *Id.*

¹⁷⁰ *Cariaga v. Dryden*, 29 Cal. 307.

¹⁷¹ *Ex parte Many*, 14 How. 24,
14 L. Ed. 311.

¹⁷² *United States v. Lawrence*, 3
Dall. 42, 1 L. Ed. 502.

¹⁷³ *Ex parte Taylor*, 14 How. 3, 14
L. Ed. 302.

¹⁷⁴ *Smith v. Jackson*, 1 Paine, 453,
Fed. Cas. No. 13064.

¹⁷⁵ *State v. Judge of the Third
District*, 17 La. Ann. 328.

¹⁷⁶ *Ex parte Hoyt*, 13 Pet. 279,
10 L. Ed. 161.

¹⁷⁷ *Ex parte Davenport*, 6 Pet.
661, 8 L. Ed. 537.

¹⁷⁸ *White v. United States*, 1
Black, 501, 17 L. Ed. 227.

¹⁷⁹ *Bank of Columbia v. Sweeny*,
1 Pet. 567, 7 L. Ed. 265.

¹⁸⁰ *State v. Thompson*, 36 Mo. 70;
Kelly v. Edwards, 69 Cal. 460, 11 Pac.
1.

¹⁸¹ *Meredith v. Board of Super-
visors*, 50 Cal. 433; *Henderson v.
Glynn*, 2 Colo. App. 303, 30 Pac.
265.

¹⁸² *Tobey v. Hakes*, 54 Conn. 274,
1 Am. St. Rep. 114, 7 Atl. 551; *State
v. Republican River Bridge Co.*, 20
Kan. 404.

¹⁸³ *State v. Board Medical Ex-
aminers*, 10 Mont. 162, 25 Pac. 440.

¹⁸⁴ *State v. Getchell*, 3 N. Dak.

to real estate is involved.¹⁸⁵ It will not be awarded to review a ruling or interlocutory order made in the progress of a cause.¹⁸⁶ Nor is it the proper proceeding by which to try the title to an office.¹⁸⁷

If the writ will not be beneficial, or will be ineffectual, it will not be issued.¹⁸⁸

§ 7081. **Party interested.**—*Mandamus* by the state will not lie to compel the county superintendent to take the steps provided by law for adjustment of property and moneys between a school district and a city to which part of the district's territory has been added, the state having no interest in the matter.¹⁸⁹ A writ of mandate will not be issued except on the application of the party beneficially interested. A private citizen was not entitled to such writ to compel a justice of the peace to issue a warrant of arrest for an alleged misdemeanor committed by another in unlawfully playing a game of chance with a slot-machine, where there was nothing to show that its operation constituted an injury to plaintiff different in kind from the general public.¹⁹⁰ Any person is entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. Where a corporation, of which the district judge was a stockholder, brought *mandamus* to compel him to pass upon a claim against an insolvent estate, another claimant had sufficient interest to intervene by asking that he be compelled to call another judge.¹⁹¹

In Washington, an application in the interest of a private party is properly instituted in the name of the state;¹⁹² but the action

243, 55 N. W. 585; *State v. Currie*, 3 N. Dak. 310, 55 N. W. 858.

¹⁸⁵ See *Eby v. School Trustees*, 87 Cal. 166, 25 Pac. 240.

¹⁸⁶ *Scott v. Superior Court*, 75 Cal. 114, 16 Pac. 547; *Lake v. King*, 16 Nev. 215.

¹⁸⁷ *Biggs v. McBride*, 17 Or. 640, 21 Pac. 878, 5 L. R. A. 115; *Gregory v. Blanchard*, 98 Cal. 311, 33 Pac. 199; *State v. Callahan*, 4 N. Dak. 481, 61 N. W. 1025.

¹⁸⁸ *Miller v. Dailey*, 136 Cal. 212, 68 Pac. 1029; *De la Beckwith v. Superior Court*, 146 Cal. 496, 80 Pac. 717; *French v. State Senate*, 146 Cal.

604, 69 L. R. A. 556, 80 Pac. 1031; *State v. Board State Canvassers*, 32 Mont. 13, 79 Pac. 402; *State v. Superior Court*, 37 Wash. 30, 79 Pac. 483; *State v. Williams*, 45 Or. 314, 77 Pac. 965, 67 L. R. A. 166; *Finley v. Territory*, 12 Okla. 621, 73 Pac. 273.

¹⁸⁹ *State v. Wright*, 67 Kan. 847, 73 Pac. 50.

¹⁹⁰ *Fritts v. Charles*, 145 Cal. 512, 78 Pac. 1057.

¹⁹¹ *State v. Mack*, 26 Nev. 430, 69 Pac. 862.

¹⁹² *State v. Steiner*, 41 Wash. 439, 83 Pac. 1027.

may be conducted in the names of the real parties in interest.¹⁹³ In compelling a watermaster to distribute water from a different stream, all parties affected are necessary parties.¹⁹⁴

§ 7082. **Joinder of parties.**—Under the statutes allowing all persons having an interest in the subject of the action and in obtaining the relief demanded to be joined as plaintiffs,¹⁹⁵ candidates for the offices of sheriff and treasurer of a county may join to compel a recanvass of the votes;¹⁹⁶ or two claimants of the same office may join for the same purpose.¹⁹⁷

Though one person be the secretary of several corporations, he must be sued in separate actions for refusing a stockholder in all of the corporations the privilege of inspecting the books of any of them.¹⁹⁸ The corporation need not be joined as a party defendant.¹⁹⁹

§ 7083. **Parties defendant.**—Different officers, having separate duties in the levy of taxes, may be joined as parties defendant.²⁰⁰ A writ of *mandamus* is properly directed to the mayor and the city council to compel a tax levy.²⁰¹ In *mandamus* by one who was appointed patrolman to restore the recorded resolution, which, after being recorded, had been altered so as to show the appointment of another person, the person so substituted was not a necessary party.²⁰² In a *mandamus* proceeding to compel the issuance of a county warrant to the claimant, in payment of an allowed claim, the joinder of the county commissioners as parties, on the theory that the county would be ultimately affected by the result, was not improper.²⁰³

A proceeding by *mandamus* to compel the calling of an election to vote on the disincorporation of a city must be brought against the board of trustees of the city, and not against its members individually.²⁰⁴

193 *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

194 *Stethem v. Skinner*, 11 Idaho, 374, 82 Pac. 451.

195 Colo. Code Civ. Proc., § 10.

196 *Lehman v. Pettingell*, 39 Colo. 258, 89 Pac. 48.

197 *State v. Kendall*, 44 Wash. 542, 87 Pac. 821.

198 *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

199 *Merrill v. Suffa*, 42 Colo. 195, 93 Pac. 1099.

200 *State v. Harbison*, 64 Kan. 295, 67 Pac. 844.

201 *Territory v. City of Socorro*, 12 N. Mex. 177, 76 Pac. 283.

202 *City of Denver v. People*, 17 Colo. App. 190, 68 Pac. 114.

203 *American Bridge Co. v. Wheeler*, 35 Wash. 40, 76 Pac. 534.

204 *Taylor v. Burks*, 6 Cal. App. 225, 91 Pac. 814.

§ 7084. **Notice of application.**—Where notice of the motion, and a copy of the papers on which the motion is founded, have been duly served on the district judge, the supreme court may, in its discretion, issue either an alternative or a peremptory writ, in the first instance.²⁰⁵

When the application to the court is made without notice to the adverse party, and the writ is allowed, the alternative must first be issued; but if the application is upon due notice, and the writ is allowed, the peremptory may be issued in the first instance. With the alternative writ, and also with any notice of an intention to apply for the writ, there must be served on each person against whom the writ is sought a copy of the petition. The notice of the application, when given, must be at least ten days. The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.²⁰⁶

§ 7085. **Proceedings, where commenced.**—Proceedings for *mandamus* to compel the execution of a sheriff's deed to a redemptioner can be commenced in the county where the relator resides.²⁰⁷ The provision of the statute, that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty.²⁰⁸ The rules of the Civil Practice Act are applicable to pleadings and proceedings in *mandamus*.²⁰⁹ Trial courts should be liberal in matters of pleading and practice in proceedings by *mandamus* to compel the delivery of water for irrigation.²¹⁰

§ 7086. **Relief awarded.**—If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.²¹¹ Where

²⁰⁵ *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 295.

²⁰⁶ Cal. Code Civ. Proc., § 1088.

²⁰⁷ *McMillan v. Richards*, 9 Cal. 420, 70 Am. Dec. 655.

²⁰⁸ *Id.*

²⁰⁹ *People v. Board of Supervisors*, 27 Cal. 665.

²¹⁰ *Townsend v. Fulton Irr. Ditch Co.*, 17 Colo. 142, 29 Pac. 453. See *Merrill v. Southside Irr. Co.*, 112 Cal. 426, 44 Pac. 720.

²¹¹ Cal. Code Civ. Proc., § 1095.

an alternative writ is not procured, the court may grant any relief consistent with the case made by the petition and embraced within the issue, although it may be only part of that asked in the prayer of the petition.²¹²

§ 7087. **Petition, complaint, or application.**—A petition for *mandamus* to compel the readmission of a student to college must set out all the facts showing his expulsion to be without authority.²¹³ Several causes may be properly joined.²¹⁴ A former affidavit cannot, by reference thereto, be made to supply any defects in a subsequent application.²¹⁵ The petition should set out the official capacity, if any, of the defendants, and the necessity for the writ at the time.²¹⁶ A petition for *mandamus* to require the district attorney to institute *quo warranto* proceedings must allege facts to clearly show that respondent's refusal to act was arbitrary, and not a mistake of judgment.²¹⁷ A portion of a petition for *mandamus* to compel the state board of examiners to audit and allow a claim under the statute, which did not contain any allegation that the county ever maintained or supported any person for the time to which the claim referred, was insufficient.²¹⁸ A prayer for alternative relief is not fatal to a petition for *mandamus*.²¹⁹ The petition in proceedings by *mandamus* to require the board of canvassers to canvass the votes for a particular office must show that an election for that office was held, and where the issuance of the writ is demanded it must also show a legal interest in the relator in the result of the proposed action.²²⁰

§ 7088. **Petition for mandamus.**—The petition and affidavit for *mandamus* need not necessarily be separate papers. Since the petition must contain all the matters which would be set out in the affidavit, it is sufficient if the petition be sworn to.²²¹ The writ is issued upon the verified petition of the party beneficially inter-

²¹² *People v. Board of Supervisors*, 27 Cal. 665.

²¹³ *Miller v. Dailey*, 136 Cal. 212, 68 Pac. 1029; *State v. Board of Dental Examiners*, 38 Wash. 325, 80 Pac. 544.

²¹⁴ *State v. Harbison*, 64 Kan. 295, 67 Pac. 844.

²¹⁵ *Chapin v. City of Port Angeles*, 31 Wash. 535, 72 Pac. 117.

²¹⁶ *State v. Byrne*, 32 Wash. 264, 73 Pac. 394.

²¹⁷ *Buggeln v. Doe*, 9 Ariz. 81, 78 Pac. 367.

²¹⁸ *San Luis Obispo County v. Gage*, 139 Cal. 398, 73 Pac. 174; *Board of Trustees v. Edner*, 18 Colo. App. 65, 70 Pac. 152.

²¹⁹ *School District v. School District No. 7*, 33 Colo. 43, 78 Pac. 690.

²²⁰ *State v. Chatterton*, 12 Wyo. 168, 73 Pac. 961.

²²¹ *Golden Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142. As to requisites

ested.²²² The old rule of practice, according to which *mandamus* proceedings are instituted in the name of the state upon the relation of the party interested, will not be disturbed.²²³ It is no defense to *mandamus* to compel a city to levy a tax to pay bonds that the relator owned only a portion of the issue, as the other bondholders may assert their right to participate in the fruits of the *mandamus* in a proper proceeding.²²⁴ An application for a writ of mandate to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the attorney-general, but by an attorney of the relator, will not be dismissed because not made in the name of some one interested, if the attorney-general unites in the brief in support of the application.²²⁵ A petition for a *mandamus* to compel county commissioners to declare the petitioner register of deeds should aver affirmatively that a vacancy existed when the alleged election took place.²²⁶ A statement in a petition against a controller is bad if it fails to allege that there is "money not otherwise appropriated by law" out of which the compensation in question is to be paid.²²⁷ In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go can be the relator.²²⁸

§ 7089. Pleadings in mandamus—Answer.—On the return of the alternative, or the day on which the application for the writ

of petition for writ of mandamus against public officer, to compel him to perform a statutory duty, see *Schwanbeck v. People*, 15 Colo. 64, 24 Pac. 575.

²²² Cal. Code Civ. Proc., § 1086.

²²³ *State v. Curler*, 26 Nev. 347, 67 Pac. 1075.

²²⁴ *Territory v. City of Socorro*, 12 N. Mex. 177, 76 Pac. 283.

²²⁵ *People v. Board of Supervisors*, 36 Cal. 595. For averments necessary in petition for a mandamus to a county treasurer to pay county warrants, see *Connor v. Morris*, 23 Cal. 447. For sufficient statement in mandamus on declaring the result of an election, see *Calaveras County v. Brockway*, 30 Cal. 325.

²²⁶ *Rose v. Knox County Commissioners*, 50 Me. 243.

²²⁷ *Redding v. Bell*, 4 Cal. 333.

²²⁸ *People v. Board of Supervisors*, 26 Cal. 641. See, also, *Supervisors v. United States*, 4 Wall. 435, 18 L. Ed. 419. As to when a petition for a peremptory mandate to the judge of a district court to enter the name of the petitioner as an attorney of record in a cause will be denied, see *Herrington v. Sawyer*, 36 Cal. 289. For petition for mandamus to command city council to direct city treasurer to pay expenses incurred in the support of schools, see *State v. City of Cincinnati*, 19 Ohio, 178. For petition for mandamus to compel a county treasurer to pay a warrant previously issued by the county auditor, see *Jones v. Morgan*, 67 Cal. 308, 7 Pac. 734. For petition to compel auditor to allow claim of petitioner, see *Burke v.*

is noticed, the party on whom the writ or notice has been served may answer the petition under oath, in the same manner as an answer to a complaint in a civil action.²²⁹ The return is deemed controverted without a reply.²³⁰ The answer of a board of supervisors should be in form the answer of the board in its aggregate capacity. And the fact that it was sworn to by one member of the board does not make it his answer; nor is it necessary that such answer should aver that the board by resolution adopted it. If two answers be filed, each in the form of the answer of the board, the court may ascertain which is the return of the majority.²³¹

§ 7090. **Demurrer to answer.**—On the trial, the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.²³² Demurrer cannot rightfully be sustained if the answer sets up any defense whatever.²³³ A motion for judgment on the pleadings is equivalent to a demurrer to the answer, and objections which are required to be taken by special demurrer will be disregarded on such motion.²³⁴ The general rule that if a party whose duty it is to perform some act bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law.²³⁵ It being in contemplation of law, the superintendent of schools, on demurrer to his answer being sustained, should be given time in which to order a new census to be taken, and set it up by way of amended and supplemental answer.²³⁶

§ 7091. **Proceedings and practice on mandamus—Affidavit.**—It must be issued upon the verified petition of the party beneficially interested.²³⁷ It must be shown distinctly by the affidavits that the

Edgar, 67 Cal. 182, 7 Pac. 488. As to answer supplying defects in petition, see *Williard v. Dillard*, 86 Cal. 154, 24 Pac. 940.

²²⁹ Cal. Code Civ. Proc., § 1089.

²³⁰ *State v. McQuade*, 36 Wash. 579, 79 Pac. 207.

²³¹ *People v. Board of Supervisors*, 27 Cal. 665. As to answer of treasurer on demand made upon him to pay a warrant drawn by the auditor, see *Keller v. Hyde*, 20 Cal. 594; *Connor v. Morris*, 23 Cal. 451.

²³² Cal. Code Civ. Proc., § 1091.

²³³ *Finley v. Territory*, 12 Okla. 621, 73 Pac. 273.

²³⁴ *People v. Board of Supervisors*, 27 Cal. 665; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405.

²³⁵ *Id.*

²³⁶ *State v. Wedge*, 27 Nev. 61, 72 Pac. 817.

²³⁷ Cal. Code Civ. Proc., § 1086; *People v. Pacheco*, 29 Cal. 210; *Ex parte Fleming*, 2 Wall. 759, 17 L. Ed. 924; *Eby v. Board of Trustees*, 87

possession under a writ of restitution was acquired under the parties, or subsequent to the filing of a *lis pendens*, or the applications will be denied.²³⁸ When *mandamus* proceedings are instituted to redress a private wrong or enforce a private right, the party beneficially interested should be named as plaintiff.²³⁹ The affidavit upon which the writ is issued may be treated as a complaint.²⁴⁰ The writ should be commenced in the name of the sovereign power on the relation of the party aggrieved.²⁴¹ If the writ is sought for the benefit of the relator alone, the fact of his special and peculiar right to the writ must be made to appear by the affidavit.²⁴² In an application for *mandamus* against an assessor to compel him to extend special taxes levied by town authorities, the town, as relator, is the proper party.²⁴³

§ 7092. **Demand a condition precedent.**—It is an imperative rule of the law of *mandamus* that previously to the making of the application to the court for the writ, to command the performance of a particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied—it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the court for the purpose of compelling him.²⁴⁴ *Mandamus* will lie to compel a city council to order a special election for mayor to fill a vacancy without prior demand on the council for such order and a refusal thereof, the duty enjoined on the council being public in its nature.²⁴⁵ A demand on

Cal. 166, 25 Pac. 240; Hyatt v. Allen, 54 Cal. 353; Peck v. Board of Supervisors, 90 Cal. 384, 27 Pac. 301.

238 Fogarty v. Sparks, 22 Cal. 143.

239 Smith v. Lawrence, 2 S. Dak. 185, 49 N. W. 7; Howard v. City of Huron, 5 S. Dak. 539, 59 N. W. 833, 26 L. R. A. 493.

240 McCrary v. Beaudry, 67 Cal. 120, 7 Pac. 264.

241 Collet v. Allison, 1 Okla. 42, 25 Pac. 516; Rider v. Brown, 1 Okla. 244, 32 Pac. 341; State v. Carey, 2 N. Dak. 36, 49 N. W. 164.

242 Id.

243 Aggers v. People, 20 Colo. 348, 38 Pac. 386.

244 People v. Romero, 18 Cal. 90; Crandall v. Amador County, 20 Cal. 72; Oroville etc. R. R. Co. v. Supervisors, 37 Cal. 363. See Price v. Riverside etc. Co., 56 Cal. 431; People v. Reis, 76 Cal. 269, 18 Pac. 309; Buggeln v. Doe, 8 Ariz. 341, 76 Pac. 458; Wilson v. Board Directors Veterans' Home, 138 Cal. 67, 70 Pac. 1059.

245 Rizer v. People, 18 Colo. App. 40, 69 Pac. 315; State v. Byrne, 32 Wash. 264, 73 Pac. 394.

a county treasurer by a private citizen to be accorded permission to examine "any and all books of public records in the treasurer's office," was too general to be the basis of a writ of mandate against the treasurer.²⁴⁶

§ 7093. **Determination.**—Judgment may be affirmed as to the *mandamus*, and reversed as to the costs.²⁴⁷ In *mandamus* to compel the execution of a sheriff's deed, the proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* cannot determine these rights or in any respect the interest of third parties.²⁴⁸ On a petition for a mandate, requiring a trial judge to settle and certify his bill of exceptions on appeal from an order striking from the files affidavits on motion for a new trial because of irregularities of the trial judge, the court will not determine any conflict in the evidence as to such irregularities.²⁴⁹

§ 7094. **Form of writ.**—The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so.²⁵⁰ The alternative writ of *mandamus* formerly stood for a complaint, and if it improperly united several causes of special proceedings, and was demurred to on that ground, the relator could proceed only by filing an amended writ containing the cause he elected to pursue.²⁵¹ An alternative writ directed to the mayor and to the clerk of a city, and to the city itself, to compel the issuance of a warrant for the amount of a judgment recovered by petitioner against the city, is insufficient if it does not allege that the judgment has been satisfied and a certified transcript thereof presented to the defendants.²⁵² It is the practice of the supreme court to issue an order to show cause why the relief should not

²⁴⁶ State v. Reed, 36 Wash. 638, 79 Pac. 306.

²⁴⁷ McDougal v. Roman, 2 Cal. 80.

²⁴⁸ McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

²⁴⁹ Gay v. Torrance, 145 Cal. 144,

78 Pac. 540; People v. Vanhorn, 20 Colo. App. 215, 77 Pac. 978.

²⁵⁰ Cal. Code Civ. Proc., § 1087.

²⁵¹ State v. Williams, 45 Or. 314,

77 Pac. 965, 67 L. R. A. 166.

²⁵² Chapin v. City of Port Angeles, 31 Wash. 535, 72 Pac. 117.

be granted.²⁵³ The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return-day inserted.²⁵⁴ The writ formerly recited all the facts entitling relator to have the act done for which he asks.²⁵⁵ It was not enough to refer to the petition and affidavits.²⁵⁶ The command of the writ must be according to the duty.²⁵⁷ The writ must correspond to the order directing its issue.²⁵⁸ One and the same writ cannot be directed to two several townships.²⁵⁹ It is not fatal if it be directed to the members of a corporation, instead of the corporation by its corporate name.²⁶⁰

§ 7095. **Disobedience of writ.**—When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of disobedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.²⁶¹

§ 7096. **Answer.**—Grounds of defense, to be considered, must be set out in a return or answer.²⁶² After the alternative writ had issued, the complaint or petition was *functus officio*, and could not be answered or demurred to; the pleading was then directed to the alternative writ. The answer to the petition then raised no issue.²⁶³ Allegations not denied are deemed admitted.²⁶⁴ A

²⁵³ *State v. Jumbo Extension Min. Co.*, 30 Nev. 192, 94 Pac. 74.

²⁵⁴ Cal. Code Civ. Proc., § 1087.

²⁵⁵ *Commercial Bank v. Canal Commissioners*, 10 Wend. 25.

²⁵⁶ *Id.*; *McLeod v. Scott*, 21 Or. 94, 26 Pac. 1061, 29 Pac. 1; *Elliott v. Oliver*, 22 Or. 44, 29 Pac. 1; *People v. Supervisors*, 15 Barb. 607.

²⁵⁷ *People v. Supervisors*, 1 Hill, 50; *People v. Supervisors*, 1 Hill, 362.

²⁵⁸ *Hawkins v. More*, 3 Ark. 345.

²⁵⁹ *State v. Chester & Evesham*, 5 Halst. (N. J. L.) 292.

²⁶⁰ *Fuller v. Plainfield Academic School*, 6 Conn. 532. For forms of writ of mandamus commanding city council to direct city treasurer to pay claims allowed by school board, see *State v. City of Cincinnati*, 19 Ohio, 182.

²⁶¹ Cal. Code Civ. Proc., § 1097.

²⁶² *State v. Yankey*, 43 Wash. 15, 85 Pac. 990.

²⁶³ *Chipman v. Forward*, 41 Colo. 442, 92 Pac. 913.

²⁶⁴ *State v. Murphy*, 20 Nev. 149, 85 Pac. 1004.

denial merely negating the assertions of the petition is sufficient to permit evidence upon the issue raised.²⁶⁵

§ 7097. **Return.**—The return, to be sufficient, must show a legal justification;²⁶⁶ as that a bill of exceptions tendered was not a true bill.²⁶⁷ When objectionable, the judge should return the causes of objection.²⁶⁸ In a return to a *mandamus* to restore a member to a church, the power of those to expel him should be stated.²⁶⁹ The return must respond to the allegations of the writ.²⁷⁰ When the return puts in issue no material facts affecting the substantial rights of the parties, the court may hear and determine the case upon questions of law alone.²⁷¹ Under the code, issue may be taken on the truth of the return; at common law, the return was conclusive.²⁷² The return may be amended.²⁷³ Where in *mandamus* the answer was not verified as required, but respondent, on his attention being called to the fact, made no application to amend, the answer could not be regarded as controverting the facts stated in the petition.²⁷⁴ The proper way for the justices of a county to make return to a *mandamus* is for them to convene, and, a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding.²⁷⁵

§ 7098. **Service of writ.**—The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.²⁷⁶ Failure to serve a copy of the petition and writ upon the opposite party as required by rule of the court, is ground for dismissing the petition, if no offer is made to comply with the

²⁶⁵ Ferguson v. Board of Education, 7 Cal. App. 568, 95 Pac. 165.

²⁶⁶ Burnet v. Auditor etc., 12 Ohio, 54.

²⁶⁷ State v. Todd, 4 Ohio, 351.

²⁶⁸ People v. Pearson, 2 Seam. 189, 33 Am. Dec. 445.

²⁶⁹ Green v. African Meth. Church, 1 Sandf. 254.

²⁷⁰ Gorgas v. Blackburn, 14 Ohio, 252.

²⁷¹ Howard v. City of Huron, 5 S.

Dak. 539, 59 N. W. 833, 26 L. R. A. 493.

²⁷² State v. Wilmington Bridge Co., 3 Har. 540.

²⁷³ Springfield v. Hampden County Commissioners, 10 Pick. 59.

²⁷⁴ People v. District Court, 33 Colo. 77, 79 Pac. 1014.

²⁷⁵ Lander v. McMillan, 8 Jones L. (N. C.) 174.

²⁷⁶ Cal. Code Civ. Proc., § 1096; Wash. Bal. Codes, § 5766; Taylor v.

rule.²⁷⁷ If the defendant named is not the real party in interest, such party must be named, under affidavit, and the same service and proof of service must be made upon all the real parties in interest.²⁷⁸

§ 7099. **Motion to quash.**—A motion to quash the writ, not setting out new matter, admits the truth of the matter in the application, and will not raise such questions for reconsideration in the supreme court.²⁷⁹ Unless defendant raises a question of jurisdiction, an answer must be filed in the first instance, and not a motion to quash; for such a motion may be treated as an answer admitting the facts pleaded by plaintiff.²⁸⁰ A delay of four years in making an application for a writ of *mandamus* to compel a court to amend a statement on motion for a new trial, and an additional delay of two years after the alternative writ was ordered before it was issued, authorize the court issuing it to quash the writ on motion.²⁸¹

§ 7100. **Demurrer to petition or writ.**—Separate demurrers to the affidavit or verified petition may be filed by the different defendants. It is better practice to raise any objection by demurrer or answer than by motion to quash.²⁸² If one answer is all that is required, even though the applicant afterward files an amended petition,²⁸³ then one demurrer filed runs against all amended petitions filed therein, in so far as it is applicable.²⁸⁴

§ 7101. **Hearing.**—The writ cannot be granted by default. The case must be heard by the court, whether the adverse party appears or not.²⁸⁵ The hearing is had and evidence introduced under the regular rules of evidence.²⁸⁶ If no answer be made, the

Burks, 6 Cal. App. 225, 91 Pac. 814;
State v. Kendall, 44 Wash. 542, 87
Pac. 821.

²⁷⁷ Coffey v. Grand Council, 87
Cal. 367, 25 Pac. 547.

²⁷⁸ Connolly v. Woods, 13 Idaho,
591, 92 Pac. 573.

²⁷⁹ State v. Ledwidge, 27 Mont.
197, 70 Pac. 511.

²⁸⁰ Wilson's Okla. Rev. Stats.,
§ 4892; Beadles v. Fry, 15 Okla. 428,
82 Pac. 1041, 2 L. R. A. (N. S.)
855.

²⁸¹ State v. District Court, 29
Mont. 265, 74 Pac. 498.

²⁸² State v. Jumbo Extension Min.
Co., 30 Nev. 192, 94 Pac. 74.

²⁸³ Ariz. Rev. Stats. 1901, par.
1367; Leatherwood v. Hill, 10 Ariz.
243, 89 Pac. 521.

²⁸⁴ Leatherwood v. Hill, 10 Ariz.
243, 89 Pac. 521.

²⁸⁵ Cal. Code Civ. Proc., § 1088.

²⁸⁶ San Luis Obispo County v.
Gage, 139 Cal. 398, 73 Pac. 174;
French v. State Senate, 146 Cal. 604,

case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.²⁸⁷ In such case the court may hear and determine the matter on the pleadings.²⁸⁸ If a material question of fact be raised by the answer, the court may, in its discretion, order it tried by a jury, and postpone the argument until the trial can be had and the verdict certified to the court. The question must be distinctly stated in the order for trial, and the county designated where the trial shall be had.²⁸⁹ In *mandamus* to compel the state board of examiners to audit a claim against the state, it was the duty of the court to find on all the facts at issue, including the affirmative allegations of the answer which were material and constituted a good defense to the action.²⁹⁰ The court, in *mandamus* to compel the clerk to print the name of one of the candidates so excluded on the ballot, had jurisdiction to decide the entire controversy, and require the printing of names of all the candidates so erroneously excluded.²⁹¹

§ 7102. Judgment.—If judgment be given for the applicant, he may recover the damages he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate must also be awarded without delay.²⁹² A judge against whom a *mandamus* is granted is not liable in damages to plaintiff, providing that, on judgment for the applicant, he may recover damages which he has sustained and costs.²⁹³ On judgment for plaintiff in *mandamus*, he may, in the same proceeding, recover such damages as he has

80 Pac. 1031, 69 L. R. A. 556; State v. District Court, 26 Mont. 372, 68 Pac. 465; State v. Board of Dental Examiners, 38 Wash. 325, 80 Pac. 544.

²⁸⁷ Cal. Code Civ. Proc., § 1094.

²⁸⁸ Town of Hayward v. Pimental, 107 Cal. 386, 40 Pac. 545.

²⁸⁹ Cal. Code Civ. Proc., § 1090; Idaho Rev Stats. 1887, § 4982; Nelson v. Steele, 12 Idaho, 762, 88 Pac. 95; Hewel v. Hugin, 3 Cal. App. 248, 84 Pac. 1002.

²⁹⁰ San Luis Obispo County v. Gage, 139 Cal. 398, 73 Pac. 174.

²⁹¹ State v. Weston, 27 Mont. 185, 70 Pac. 519; People v. Vanhorn, 20 Colo. App. 215, 77 Pac. 978.

²⁹² Cal. Code Civ. Proc., § 1095. See, also, same code, § 1090. As to judgment in *mandamus* proceedings, see Price v. Riverside etc. Co., 56 Cal. 431; Johnson v. Supervisors, 65 Cal. 481, 4 Pac. 463.

²⁹³ Hill v. Morgan, 9 Idaho, 777, 76 Pac. 765.

actually sustained through the wrongdoing of a defendant.²⁹⁴ A city council cannot, after the service of an alternative writ of *mandamus* ordering it to levy a tax for a certain purpose, by making the annual levy and omitting therefrom the levy which it has ordered to make, defeat the *mandamus* proceeding; and where it attempts to do so, it is competent for the court to compel it to reconvene and correct the levy, or add an additional levy sufficient to pay the claim.²⁹⁵ A disobedience of a peremptory mandate may be punished by fine not exceeding one thousand dollars; and if the refusal to obey the writ is persisted in, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.²⁹⁶

§ 7103. *New trial.*—The motion for new trial must be made in the court in which the issue of fact was tried.²⁹⁷ If no notice of a motion for a new trial be given, or if given, be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, must transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.²⁹⁸

§ 7104. *Violation of mandamus.*—A judge of a lower court is bound by the alternative writ until the *remittitur* from the higher court releasing him is filed in the lower court; and setting the cause for hearing prior to such time, even though it be after the application has been denied by the higher court, is a technical contempt.²⁹⁹ The secretary of a corporation resigning after the hearing is set for trial is not guilty of contempt for failure to obey the peremptory writ and submit the books of the corporation for inspection, he not then being secretary. But his resignation should be for good cause, and not to avoid the court's order.³⁰⁰ A temporary secretary, taking the place of the regular secretary prior to his service by peremptory writ of mandate, not being a party to the proceeding,

²⁹⁴ McClure v. Scales, 64 Kan. 282, 67 Pac. 856.

²⁹⁵ City Council v. Board of Commissioners, 33 Colo. 1, 77 Pac. 858.

²⁹⁶ Cal. Code Civ. Proc., § 1097.

²⁹⁷ Cal. Code Civ. Proc., § 1092.

²⁹⁸ Cal. Code Civ. Proc., § 1093.

²⁹⁹ Noel v. Smith, 2 Cal. App. 158, 83 Pac. 167.

³⁰⁰ Egilbert v. Superior Court, 6 Cal. App. 190, 91 Pac. 748.

will not be guilty of contempt for failure to submit the corporate books for inspection.³⁰¹

§ 7105. *Mandamus—Miscellaneous.*—In an application to the supreme court for *mandamus*, no alternative writ will be issued, unless the allegations in the petition therefor make out a *prima facie* case for the issuance of a peremptory writ.³⁰² An alternative writ of *mandamus* was quashed because it appeared that the motion for a new trial, which it directed the district judge to decide, was not pending before him for decision.³⁰³ *Mandamus* will not lie to compel action on the part of an inferior court until it is made clearly to appear that such inferior court has been regularly and properly moved to take the required action, and has unwarrantably refused to act.³⁰⁴ It will not lie to compel a judge to settle a statement of facts, when he has not refused to do so, but has continued the matter until he could have an opportunity to examine the statement and the objections thereto.³⁰⁵ Nor will it lie to compel the court to enter a *nunc pro tunc* order substituting one attorney for another in a pending action;³⁰⁶ nor to compel the board of school examiners of a county to issue a teacher's certificate to an applicant entitled thereto, a remedy in such case being provided by statute.³⁰⁷ An order of a superior court refusing a writ of mandate is a final judgment, from which an appeal may be taken.³⁰⁸

FORMS—MANDAMUS.

§ 7106. *Petition for writ of mandamus—Outline form.*

Form No. 1884.

[TITLE.]

To the Hon. . . . , Judge of said Court in and for said . . . County:

The petition of C. D., of . . . , in the county of . . . , state of . . . , respectfully alleges:* [Allege fully the facts showing that

301 *Banter v. Superior Court*, 6 Cal. App. 195, 91 Pac. 749.

302 *Parrish v. Reed*, 2 Wash. 491, 27 Pac. 230, 23 Pac. 372.

303 *State v. Judge of District Court*, 3 N. Dak. 43, 53 N. W. 433. As to waiver of objections to alternative writ, see *State v. Moss*, 13 Wash. 42, 42 Pac. 622, 43 Pac. 373.

304 *State v. Hunter*, 4 Wash. 651, 30 Pac. 642, 32 Pac. 294.

305 *State v. Superior Court*, 13 Wash. 514, 43 Pac. 636.

306 *State v. Langley*, 13 Wash. 636, 43 Pac. 875.

307 *State v. Hitt*, 13 Wash. 547, 43 Pac. 638.

308 *People v. Thompson*, 66 Cal. 398, 5 Pac. 686.

the officer to whom the writ is to be directed is charged with the performance of a specific legal duty; that the circumstances have arisen which make it incumbent on the officer to at once discharge the duty; that he refuses to do so; and that there is no other adequate and speedy remedy for such refusal.]

Wherefore, the petitioner prays judgment, that a peremptory writ of *mandamus* issue out of this court commanding the said [name officer] to [state precise duty to be performed]; and for such other judgment or order as may be proper.

G. H., Attorney for Petitioner.

[Add verification as in case of a pleading.]

§ 7107. Petition for mandamus against officers of city, to compel levy of tax to pay judgment.

Form No. 1885.

[Proceed as in the last preceding form to the star (*), and continue:] That the city of . . . is a municipal corporation organized and existing under the laws of the state of . . . , and that the defendants are the officers of said corporation authorized by law to levy and collect taxes for and on behalf of said corporation; that on the . . . day of . . . , 19 . . . , the plaintiff recovered a judgment in this court [or name court] against said city, upon a negotiable bond issued by it, for the sum of . . . dollars and costs; that on the . . . day of . . . , 19 . . . , an execution was issued on said judgment and returned wholly unsatisfied, no property of said corporation being found on which to levy the same; that it became the duty of the defendants on or before the . . . day of . . . , 19 . . . , to levy a sufficient tax upon the taxable property of said city to pay the said judgment, with interest and costs; that on the . . . day of . . . , 19 . . . , the plaintiff served upon said defendants a written demand that they levy such tax, but that they have wholly neglected and refused to do so; that plaintiff is the owner of the judgment herein referred to, and is greatly damaged and hindered in the collection of said judgment by said neglect and refusal.

Wherefore, the plaintiff prays, that a writ of *mandamus* issue commanding said defendants forthwith to levy and collect a sufficient tax to pay the said judgment, with interest and costs, together with the costs of this action, and pay the same to the plaintiff.

[Add verification as in case of a pleading.]

§ 7108. Order that alternative writ issue.

Form No. 1886.

STATE OF . . .

. . . Court for . . . County.

State ex rel. C. D.,

Petitioner,

v.

L. M., [give title of office]

Defendant. }

On reading and filing the verified petition of C. D., and on motion of G. H., attorney for the petitioner, let an alternative writ of *mandamus* issue out of, and under seal of, this court, to L. M., [give title of office], commanding him that he [here specify fully the duty to be performed]; or that in default thereof he show cause before the circuit court for . . . county, at a . . . term thereof, to be held at the courthouse in the city of . . . , in said county, at the opening of court on said day, or as soon thereafter as counsel can be heard, why he has not done so, by due return to said writ; and let a copy of said petition be served on said L. M., with such writ.

[DATE.]

J. K., Judge.

§ 7109. Notice of motion to quash alternative writ of *mandamus*.

Form No. 1887.

[TITLE.]

Take notice, that L. M., the defendant above named, will move the court at a term thereof to be held at the courthouse in the city of . . . , in said county, on the . . . day of . . . , 19 . . . , at the opening of court on that day, or as soon thereafter as counsel can be heard, to quash the alternative writ of *mandamus* issued herein, for the reason that neither the petition herein nor said alternative writ states facts showing that said C. D. is entitled to a writ of *mandamus* as prayed.

E. F., Attorney for Defendant.

To G. H., Esq., Attorney for Petitioner.

§ 7110. Alternative *mandamus*.

Form No. 1888.

[TITLE.]

The People of the State of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas, it manifestly appears to us by the petition of the said A. B., the petitioner and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this writ you do [the act required to be performed], or that you show cause before this court, at the courtroom thereof in the [city hall] in the . . . county of . . . , on the . . . day of . . . , 19 . . . , at the opening of the court on that day, why you have not done so.

Let due service hereof together with a copy of said petition be made upon the persons to whom this writ is hereinabove directed, without delay.

Witness, the Hon J. P., judge of our superior court of the state of California, at the . . . , in the . . . county of . . . , and the seal of said court, this . . . day of . . . , 19 . . .

§ 7111. Peremptory mandamus.

Form No. 1889.

[TITLE.]

The People of the State of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas, it manifestly appears to us by the petition of A. B., the petitioner and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you, that immediately after the receipt of this writ you do [the act required to be performed]. And of this writ, and what you have done thereunder, make due return on or before the . . . day of . . . , 19 . . .

Witness, the Hon. J. P., judge of the superior court of the state of California, at the courthouse in the . . . county of . . . , and the seal of said court, this . . . day of . . . , 19 . . .

J. K., Clerk.

By L. M., Deputy Clerk.

§ 7112. Notice of the application.

Form No. 1890.

To . . . :

You are hereby notified, that . . . will apply to the superior court within and for the county of . . . , on the . . . day of . . . , 19.., at the hour of . . . M., on said day, or as soon thereafter as council can be heard in the courtroom of Department No. . . . of said court for a writ of *mandamus* to issue against you, commanding you [here state the prayer of the petition, and so much of the facts as show what the party is required to do].

And you are further notified that said application will be made upon the verified petition of said applicant, a copy of which is herewith served upon you.

To [name parties to whom directed.]

[DATE.]

[SIGNATURE.]

§ 7113. Return to alternative writ of mandamus.

Form No. 1891.

[TITLE.]

I, L. M., [title of office], do hereby make return to the alternative writ of *mandamus* hereto annexed; and for cause why I have not and cannot lawfully do the things therein commanded, I respectfully represent and show to the honorable court:

That [here set forth the facts constituting the defense as in a pleading].

All of which is respectfully submitted.

L. M., [official title].

E. F., Attorney for Defendant.

[Add verification as in case of a pleading.]

§ 7114. Demurrer to return to alternative writ of mandamus.

Form No. 1892.

[TITLE.]

The relator herein demurs to the return of L. M. to the alternative writ of *mandamus* issued in this cause, on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense, nor show any cause for not obeying said writ.

G. H., Attorney for Relator.

§ 7115. Relator's answer to return.

Form No. 1893.

[TITLE.]

The above-named relator, by G. H., his attorney, answering the return of L. M., defendant, to the alternative of *mandamus* herein:

Denies that [denying such allegations as it is desired to put in issue].

And to further answer said return, the relator alleges [allege any new matter by way of avoidance of the facts stated in the return].

G. H., Attorney for Relator.

[Add verification as in case of pleading.]

§ 7116. Peremptory writ of mandamus.

Form No. 1894.

[TITLE.]

The State of . . . to L. M., [give official title], greeting:

Whereas, upon trial of the issues in the above-entitled action, this court has duly found and adjudged that [here recite the facts found showing the defendant's duty to act]:

Nevertheless you have unjustly refused, and still do refuse, to [specify act refused to be done], to the manifest injury of the said relator, as we have found and adjudged:

Now, therefore, we, being willing that speedy justice should be done in this behalf to him, the said C. D., do command and enjoin you, that immediately after receipt of this writ you [here specify act required]; and we do also command, that you make known to us before our . . . court in and for the county of . . . , at . . . , on the . . . day of . . . , 19.., how you shall have executed this writ; and have you then and there this writ.

Witness, etc.

CHAPTER CLVII.

PROHIBITION.

§ 7117. **In general.**—The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, whether exercising functions judicial or ministerial, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board, or person.¹ Prohibition is a writ for preventive relief, and is not a writ of review; nor will it serve as a second appeal, after the adverse determination of the only appeal given by statute.² The writ of prohibition authorized by section 9 of article 5 of the constitution of Idaho is the writ of prohibition known and recognized at common law.³ At common law it was issued by a superior court to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.⁴ A court having jurisdiction to issue the writ has no discretion to refuse it, when demanded by the real party in interest in a proper case.⁵ It may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed, or when by the exercise of its jurisdiction the inferior court would defeat a legal right.⁶ It may be issued by any court except police or justices' courts to an inferior tribunal,

¹ Cal. Code Civ. Proc., § 1102; Idaho Rev. Codes, § 4994; *Bragow v. Gooding*, 14 Idaho, 288, 94 Pac. 438; *Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688; *Brobeck v. Superior Court*, 152 Cal. 289, 92 Pac. 646. See *Maurer v. Michell*, 53 Cal. 289; *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *White v. Superior Court*, 110 Cal. 54, 42 Pac. 471; *Dakan v. Superior Court*, 2 Cal. App. 52, 82 Pac. 1129.

² *Valentine v. Police Court*, 141 Cal. 615, 75 Pac. 336; *State v. Superior*

Court, 45 Wash. 248, 88 Pac. 207.

³ *Stein v. Morrison*, 9 Idaho, 426, 75 Pac. 246.

⁴ *Shars. Bl. Com.* 112. As to power to issue writ of prohibition, see *Rickey v. Superior Court*, 59 Cal. 661; *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516; *Singer Mfg. Co. v. Pratt*, 20 Fla. 122; *Connecticut River R. R. Co. v. Franklin County Commissioners*, 127 Mass. 58, 34 Am. Rep. 338.

⁵ *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

⁶ *Buller N. P.* 219; 2 Ch. Pr. 355.

or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon the verified petition of the person beneficially interested.⁷ The writ will lie to prevent the exercise of unauthorized power by an inferior tribunal in cases where it has jurisdiction as well as where it has not.⁸

§ 7118. **Person interested.**—Where a criminal charge of libel is pending in a justice's court, on the complaint of the person libeled, such person has no such beneficial interest in the charge as will entitle him, under section 1103 of the California Code of Civil Procedure, authorizing the writ of prohibition to issue upon the application of the person beneficially interested, to apply for prohibition to prohibit a police justice from taking jurisdiction of the charge upon the complaint of other parties.⁹

Prohibition may be granted on the application of either of the parties litigant in the inferior tribunal.¹⁰ Independently of the statute, it would seem, both upon principle and authority, that no personal interest in the proceedings sought to be prohibited need be shown by the relator or petitioner to warrant the application, and the writ may be granted upon the application of a stranger to the record. The governing principle in such cases is that by proceeding without or in excess of its jurisdiction the court is chargeable with a contempt of the sovereign as well as a grievance to the party injured.¹¹ A writ of prohibition to prohibit the court from further proceeding in the matter of the removal of officers of a corporation may be brought in the name of the corporation.¹² Section 1103 of the California Code of Civil Procedure provides that the writ shall issue on the application of "the person beneficially interested." It seems that the word "person," as here used, is restricted to the parties to the record and unquestionably a beneficial interest must be shown in the petitioner.^{12a} Prohibition lies as well against a court of chancery as of law; and where such court has exceeded its powers in the ap-

⁷ Cal. Code Civ. Proc., § 1103. See, also, *Sweet v. Hulbert*, 51 Barb. 312; *People v. Clute*, 42 How. Pr. 157; *People v. District Court*, 29 Colo. 83, 66 Pac. 1068.

⁸ See *Quimbo Appo v. People*, 20 N. Y. 550.

⁹ *Gage v. Fritz*, 137 Cal. 108, 69

Pac. 854; *Kitts v. Superior Court*, 5 Cal. App. 462, 90 Pac. 977.

¹⁰ *Clapham v. Wray*, 12 Mod. 423.

¹¹ See *High's Extraordinary Legal Remedies*, § 779, and cases cited.

¹² *Chollar Min. Co. v. Wilson*, 66 Cal. 374, 5 Pac. 670.

^{12a} *Gage v. Fritz*, 137 Cal. 108, 69 Pac. 854.

pointment of a receiver, prohibition has been granted to restrain it from proceeding under the order of appointment.¹³ It should clearly appear that the inferior tribunal is actually proceeding or about to proceed in some matter over which it has no rightful jurisdiction.¹⁴ The writ will not issue to prevent a superior court from entertaining an appeal from a justice's court where the amount in dispute is less than two hundred dollars,¹⁵ but will lie in case the appeal is not perfected.¹⁶ The acts which show this must be set out in the application for the writ.¹⁷ And it must appear from the petition for the writ that there is some threatened injury for which the petitioner has no other adequate remedy.¹⁸ The writ will issue only when there is no plain, speedy, and adequate remedy at law.¹⁹ It is never allowed to supersede the ordinary functions of an appeal or writ of error.²⁰

§ 7119. **Recurring injury.**—An order continuing in force an attachment pending appeal is not a full, complete, and accomplished judicial act, but is a recurring injury, which may be prohibited.²¹

§ 7120. **Excess of jurisdiction.**—To authorize the issuance of a writ of prohibition, there must be an excess of jurisdiction in an absolute sense, and not an erroneous exercise of power;²² as where a superior court attempts to try a defendant for murder, upon his second trial, after an appeal from a trial and conviction for manslaughter for the same offense.²³ The exercise of judicial and ministerial power must be distinguished. For an excess of the former the writ will lie, while for the latter it will not; as to restrain the issuing of an execution, or to restrain a ministerial

¹³ Ex parte Smith, 23 Ala. 94.

¹⁴ Hopkins v. Superior Court, 136 Cal. 552, 69 Pac. 299; People v. District Court, 29 Colo. 277, 93 Am. St. Rep. 61, 68 Pac. 224; People v. District Court, 33 Colo. 293, 80 Pac. 908; Parker v. Superior Court, 25 Wash. 544, 66 Pac. 154.

¹⁵ State v. Superior Court, 31 Wash. 96, 71 Pac. 722.

¹⁶ Lane v. Superior Court, 5 Cal. App. 762, 91 Pac. 405.

¹⁷ Prignitz v. Fischer, 4 Minn. 366.

¹⁸ Harris v. Brooker, 8 Wash. 138, 35 Pac. 599.

¹⁹ Ducheneau v. Ireland, 5 Utah,

108, 13 Pac. 87; People v. Hills, 5 Utah, 410, 16 Pac. 405; Agassiz v. Superior Court, 90 Cal. 101, 27 Pac. 49; McInerney v. City of Denver, 17 Colo. 302, 29 Pac. 516.

²⁰ Powelson v. Lockwood, 82 Cal. 613, 23 Pac. 143; Walcott v. Wells, 21 Nev. 47, 52, 37 Am. St. Rep. 478, 24 Pac. 367, 9 L. R. A. 59.

²¹ Primm v. Superior Court, 3 Cal. App. 208, 84 Pac. 786.

²² People v. Whitney, 47 Cal. 584; Reclamation District v. Superior Court, 151 Cal. 263, 90 Pac. 545.

²³ Huntington v. Superior Court, 5 Cal. App. 288, 90 Pac. 141.

officer from the execution of process in his hands.²⁴ The legislature cannot extend or enlarge the office of the writ of prohibition, so as to include ministerial functions.²⁵ If an indictment states an offense, of which the court has no jurisdiction further action may be prohibited.²⁶ Prohibition will lie to prevent an injunction where injunction is forbidden,²⁷ but not if it is permissible.²⁸

Nor will this writ lie to bring under review the proceedings of an inferior tribunal merely upon the ground that they are erroneous;²⁹ nor where the tribunal has general jurisdiction of the cause will it lie to a mere point of practice;³⁰ nor to deprive a court of jurisdiction conferred by statute.³¹ The writ of prohibition will not lie against the governor of a state to restrain him from granting a commission to a person claiming to be elected to a public office, for the reason that the judiciary has no power to invade the province of the executive, that being a distinct and independent department of the government.³² The common-law rule, that the writ will not issue to an inferior tribunal in a cause arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused, is believed to be applicable in most, if not all, the states. So held in Arkansas.³³ Section 1103 of the California Code of Civil Procedure would seem to require this in all cases, as well when there was claimed to be no jurisdiction in the lower court as where it is proceeding in excess of its jurisdiction; for every indictment, not only as to the regularity of the proceedings of all courts, will be indulged, but especially will it be presumed that every court, when its attention is properly called to an act in excess of its jurisdiction, will, if it be possible, undo the unau-

²⁴ *Ex parte Braudlacht*, 2 Hill, 367; *People v. Supervisors*, 1 Hill, 195, 201.

²⁵ *Farmers' etc. Union v. Thresher*, 62 Cal. 402. That it is otherwise in Utah, see *People v. Hiram House*, 4 Utah, 369, 10 Pac. 838.

²⁶ *Kitts v. Superior Court*, 5 Cal. App. 462, 20 Pac. 977.

²⁷ *Glide v. Superior Court*, 147 Cal. 21, 81 Pac. 225.

²⁸ *State v. Superior Court*, 43 Wash. 225, 86 Pac. 632.

²⁹ *People v. District Court*, 29 Colo. 83, 66 Pac. 1068; *State v. Ausherman*, 11 Wyo. 410, 72 Pac. 200, 73 Pac. 548; *Ex parte Gordon*, 2 Hill, 363; *People v. Marine Court*, 36 Barb. 341, 14 Abb.

Pr. 266, 23 How. Pr. 446; *People v. Russell*, 19 Abb. Pr. 136, 29 How. Pr. 176.

³⁰ *Id.*; *Raine v. Lawlor*, 1 Cal. App. 483, 82 Pac. 688.

³¹ *People v. New York Com. Pleas*, 18 Abb. Pr. 438, 43 Barb. 278.

³² *Greir v. Taylor*, 4 McCord, (S. C.) 206, 17 Am. Dec. 739.

³³ *Ex parte McMeechen*, 12 Ark. 70; *Ex parte City of Little Rock*, 26 Ark. 52. See, also, *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *Baughman v. Superior Court*, 72 Cal. 572, 14 Pac. 207; *Harris v. Brooker*, 8 Wash. 138, 35 Pac. 599.

thorized act. Hence the superior court, in cases where the inferior court can recall the act or afford proper relief,—unless a direct application has been made to the lower court for that purpose, and it has been denied,—will hold that there is a plain, speedy, and adequate remedy without granting the writ; as where an injunction has been granted in direct violation of the statute, and without any jurisdiction on the part of the court, prohibition will not be granted to prevent the court from proceeding with the injunction where no application has been made to dissolve it.³⁴

It is, however, well settled that in a proper case the writ will lie, even after verdict, sentence, or judgment. Where the court has proceeded thus far, prohibition will not lie for a want of jurisdiction not apparent upon the record; but if the want of jurisdiction clearly appear on the face of the record, it will.³⁵ The writ must be either alternative or peremptory. The alternative writ must command the party to whom it is directed to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return-day inserted.³⁶

§ 7121. Other adequate remedy.—That a superior court is without jurisdiction of a cause, and a trial thereof would be expensive and troublesome, will not be sufficient ground for the granting of a writ prohibiting the court from proceeding to trial, there being a remedy by appeal for any adverse judgment.³⁷ Prohibition will not lie to review an order for the issuance of a bench-warrant after conviction, although it be conceded that no appeal lies from such order; for the bench-warrant issues as of course, and as a merely ministerial act, if the conviction be valid,

³⁴ Ex parte McMeechen, 12 Ark. 70.

³⁵ See High's Extraordinary Legal Remedies, § 774, and notes.

³⁶ Cal. Code Civ. Proc., § 1104, as amended 1907. That the provisions of

sections 1088 to 1097, inclusive, of the code, apply to this proceeding as well as to the writ of mandate, see Cal. Code Civ. Proc., § 1105.

³⁷ Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765.

and the validity of the conviction can only be determined by appeal.³⁸ Owing to the unwarranted frequency of applications for the writ of prohibition, the court may be disposed to remit applicants to their ordinary remedies.³⁹ Expenses of an appeal, and delays and annoyances incident thereto, do not affect its adequacy so as to warrant the employment, in place of an appeal, of the writ of prohibition.⁴⁰ Where an order is not appealable because the subject-matter of the controversy has ceased to exist, the writ of prohibition will not issue to review the order.⁴¹ Error of a district court in passing on a motion for change of venue cannot be reviewed by prohibition.⁴² But appeal is not an adequate remedy where change of venue has been granted from that court,⁴³ or the court has no jurisdiction, and costs of transporting witnesses are not recoverable,⁴⁴ or where an attachment is wrongfully continued pending an appeal,⁴⁵ or a public officer is removed from office pending an appeal as to his malfeasance.⁴⁶ Prohibition will not lie where writ of *supersedeas* will.⁴⁷ To restrict the illegal payment of money, injunction, and not prohibition, is the proper remedy,⁴⁸ and the writ of *certiorari* is the

³⁸ *Valentine v. Police Court*, 141 Cal. 615, 75 Pac. 336; *People v. District Court*, 29 Colo. 1, 66 Pac. 888; *People v. Stevens*, 33 Colo. 306, 79 Pac. 1018; *Mason v. Grubel*, 64 Kan. 835, 68 Pac. 660; *State v. District Court*, 27 Utah, 336, 75 Pac. 739.

³⁹ *People v. District Court*, 32 Colo. 469, 77 Pac. 239.

⁴⁰ *Carr v. Superior Court*, 147 Cal. 227, 81 Pac. 515; *Herbert v. Superior Court (Cal.)*, 91 Pac. 800; *Kinard v. Police Court*, 2 Cal. App. 179, 83 Pac. 175; *Cross v. Superior Court*, 2 Cal. App. 342, 83 Pac. 815; *Hubbard v. Justice Court*, 5 Cal. App. 90, 89 Pac. 865; *Beaulieu Vd. v. Superior Court*, 6 Cal. App. 242, 91 Pac. 1015; *People v. District Court*, 37 Colo. 440, 86 Pac. 322; *Turner v. Langan*, 29 Nev. 281, 88 Pac. 1088; *State v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State v. Neal*, 30 Wash. 702, 71 Pac. 647; *State v. Hinkle*, 47 Wash. 156, 91 Pac. 640; *State v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690; *State v.*

Superior Court, 31 Wash. 410, 71 Pac. 1100; *State v. Superior Court*, 40 Wash. 555, 111 Am. St. Rep. 925, 82 Pac. 877, 2 L. R. A. (N. S.) 395.

⁴¹ *State v. Tallman*, 38 Wash. 132, 80 Pac. 272.

⁴² *People v. District Court*, 30 Colo. 488, 71 Pac. 388; *State v. District Court*, 30 Mont. 547, 77 Pac. 318; *In re Sullivan's Estate*, 36 Wash. 217, 78 Pac. 945.

⁴³ *Keefe v. District Court*, 16 Wyo. 381, 94 Pac. 459.

⁴⁴ *Ophir Silver Min. Co. v. Superior Court*, 147 Cal. 467, 82 Pac. 70; *Dungan v. Superior Court*, 149 Cal. 98, 117 Am. St. Rep. 119, 84 Pac. 767.

⁴⁵ *Johnston v. Superior Court*, 4 Cal. App. 90, 87 Pac. 211.

⁴⁶ *Bell v. District Court*, 28 Nev. 280, 113 Am. St. Rep. 854, 81 Pac. 875, 1 L. R. A. (N. S.) 843.

⁴⁷ *McAnemy v. Superior Court*, 150 Cal. 6, 87 Pac. 1020.

⁴⁸ *Murphy v. Bantel*, 6 Cal. App. 215, 91 Pac. 805.

proper writ to review proceedings of a city board of trustees on granting a liquor license.⁴⁹

§ 7122. *Certiorari* versus prohibition.—*Certiorari* is the proper remedy to review the action of a lower tribunal or judicial body which has acted without jurisdiction;⁵⁰ and a writ of prohibition is to arrest proceedings of such, when without or in excess of jurisdiction,⁵¹ and it will not be granted for mere errors committed.⁵²

§ 7123. Ministerial acts.—The common-law writ of prohibition does not lie to prohibit or restrain purely ministerial acts, but runs to restrain encroachment of jurisdiction, assumed to be exercised, of a judicial or quasi-judicial function.⁵³

§ 7124. Legislative acts.—Prohibition does not lie against city authorities levying an assessment on property subject to assessment.⁵⁴

§ 7125. Affidavit.—The affidavit should show that the affiant has either knowledge or information concerning the matters stated in it.⁵⁵ If the proceeding in the lower court is not on its face in excess of jurisdiction, but is so in fact, by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form, to make the want of jurisdiction appear.⁵⁶ If the application is submitted on the affidavit and answer, and the answer denies the material allegations of the affidavit, it will be dismissed.⁵⁷ When notice of the application is given, it must be at least ten days.⁵⁸ The amendment of code section 1103, made March, 1907, would seem to dispense with the

⁴⁹ Hayes v. Board of Trustees, 6 Cal. App. 520, 92 Pac. 492.

⁵⁰ Id.

⁵¹ Raine v. Lawlor, 1 Cal. App. 483, 82 Pac. 688; Huntington v. Superior Court, 5 Cal. App. 288, 90 Pac. 141; Lane v. Superior Court, 5 Cal. App. 762, 91 Pac. 405; Burke v. Superior Court, 7 Cal. App. 178, 93 Pac. 1058; Gunderson v. District Court, 14 Idaho, 478, 94 Pac. 166.

⁵² Hindman v. Colvin, 46 Wash. 317, 89 Pac. 894; Kinard v. Police Court, 2 Cal. App. 179, 83 Pac. 175;

Beaulieu Vd. v. Superior Court, 6 Cal. App. 242, 91 Pac. 1015.

⁵³ Stein v. Morrison, 9 Idaho, 426, 75 Pac. 246; Miller v. Davenport, 8 Idaho, 593, 70 Pac. 610.

⁵⁴ Denning v. City of Moscow, 11 Idaho, 415, 83 Pac. 339.

⁵⁵ Cariaga v. Dryden, 30 Cal. 244.

⁵⁶ Havemeyer v. Superior Court, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

⁵⁷ Cariaga v. Dryden, 30 Cal. 244.

⁵⁸ Cal. Code Civ. Proc., § 1088. See, also, same code, § 1005.

affidavit, and substitute in its place a verified petition.⁶⁷ Facts set forth in a petition justifying the issuance of the writ, being verified, if not denied by defendant under oath, will be taken as true.⁶⁸

§ 7126. **Answer.**—On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may answer the petition under oath, in the same manner as an answer to a complaint in a civil action.⁶⁹ Denial on information and belief by one whose duty it is to know will not be considered sufficient answer.⁷⁰ If an answer be made which raises a question as to a matter of fact essential to a determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any damages the applicant may have sustained, in case they find for him.⁷¹ It may not be an abuse of discretion to refuse to submit a question of fact in dispute to a jury.⁷²

§ 7127. **Demurrer.**—The sufficiency of the answer is determined under the rules applicable to answers in general. A motion to strike out and disregard the answer as immaterial is in effect a general demurrer.⁷³ So is a motion that the writ issue notwithstanding the answer.⁷⁴ Judgment on pleadings will be reversed where the answer contains material averments of affirmative matter to which no valid objection is made.⁷⁵

§ 7128. **Default.**—The writ cannot be granted by default. The case must be heard by the court whether the adverse party appear or not.⁷⁶

⁶⁷ Cal. Code Civ. Proc., § 1103.

⁶⁸ *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61.

⁶⁹ Cal. Code Civ. Proc., § 1089.

⁷⁰ *McConoughey v. Jackson*, 101 Cal. 265, 40 Am. St. Rep. 53, 35 Pac. 863.

⁷¹ Cal. Code Civ. Proc., § 1090.

⁷² *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

⁷³ *Middleton v. Low*, 30 Cal. 599.

⁷⁴ *Ward v. Flood*, 48 Cal. 46, 17 Am. Rep. 405.

⁷⁵ *McClatchy v. Matthews*, 135 Cal. 274, 67 Pac. 134.

⁷⁶ Cal. Code Civ. Proc., §§ 1088, 1105.

§ 7129. **Hearing and practice.**—If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.⁷⁷ On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof, either in direct denial or by way of avoidance.⁷⁸ The practice is the same as in *mandamus*.⁷⁹ Facts set out in the verified complaint, not denied by the answer, are considered to be true, and need not be otherwise proved.⁸⁰

§ 7130. **Punishment.**—For a neglect or refusal to obey a peremptory writ of prohibition, the party may be punished by a fine not exceeding one thousand dollars, and for a persistent refusal may be imprisoned until the writ is obeyed.⁸¹

§ 7131. **Service of writ.**—The writ may be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.⁸²

§ 7132. **Granting or refusing writ.—Miscellaneous cases.**—A court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction, and may be restrained by writ of prohibition.⁸³ It will lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of the cause.⁸⁴ The question of want of jurisdiction must have been raised in the lower court.⁸⁵ It will

⁷⁷ Cal. Code Civ. Proc., § 1094. See *State v. Superior Court*, 14 Wash. 203, 44 Pac. 131.

⁷⁸ Cal. Code Civ. Proc., § 1091.

⁷⁹ See, generally, the preceding chapter on that subject, and Cal. Code Civ. Proc., §§ 1088 to 1105, inclusive.

⁸⁰ *Pereria v. Wallace*, 129 Cal. 397, 62 Pac. 61.

⁸¹ Cal. Code Civ. Proc., § 1097.

⁸² Cal. Code Civ. Proc., § 1096. As

to service of copy of the petition and writ, see *Havemeyer v. Superior Court*, 84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627.

⁸³ *Hayne v. Justices' Court*, 82 Cal. 284, 16 Am. St. Rep. 114, 23 Pac. 125.

⁸⁴ *North Bloomfield Gravel Mine Co. v. Keyser*, 58 Cal. 315.

⁸⁵ *People v. District Court*, 30 Colo. 488, 71 Pac. 388; *Callbreath v. District Court*, 30 Colo. 486, 71 Pac.

lie to prevent the superior court of one county from proceeding in an action against a corporation whose principal place of business is in another county, in which it was served with summons.⁸⁶ It will lie against a court which threatens to enforce by contempt proceedings the issuance of a county warrant in payment of a stenographer's fees which are not a proper county charge.⁸⁷ It will lie, in a proper case, to prevent a superior court from setting aside a sale of real estate in the administration of a decedent's estate;⁸⁸ but it will not lie to arrest the proceedings of an inferior court in the administration of an estate, unless it clearly appears that such proceedings are without, or in excess of, the jurisdiction of such inferior court.⁸⁹ Prohibition will not lie to set aside acts already performed.⁹⁰ The writ does not run to a ministerial officer;⁹¹ and a tax-collector, being a ministerial officer, cannot be restrained by prohibition from performing the duties of his office.⁹² The writ will not lie to restrain a tax levy;⁹³ nor to prevent the usurpation of an office.⁹⁴ It will not lie to restrain a board of supervisors from fixing water-rates.⁹⁵ An unsuccessful candidate in a contested election cannot maintain prohibition, for the reason that if the court has jurisdiction its action cannot be prohibited, and if it has not, its action can do him no injury.⁹⁶ It ought not to issue to restrain the progress of any legislation pending in a board authorized by the laws to legislate with respect to matters of public interest.⁹⁷ The writ will not lie to restrain courts having original jurisdiction of cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment that may be rendered by such

387; *People v. District Court*, 29 Colo. 182, 68 Pac. 242. Contra, see *State v. District Court*, 12 Wyo. 547, 76 Pac. 680.

⁸⁶ *Fresno Nat. Bank v. Superior Court*, 83 Cal. 491, 24 Pac. 157.

⁸⁷ *State v. Superior Court*, 4 Wash. 30, 29 Pac. 764. See *People v. Carrington*, 5 Utah, 531, 17 Pac. 735; *Williams v. Dwinelle*, 51 Cal. 442.

⁸⁸ *State v. Superior Court*, 10 Wash. 168, 38 Pac. 998.

⁸⁹ *State v. Benton*, 12 Mont. 66, 29 Pac. 425.

⁹⁰ *Hull v. Superior Court*, 63 Cal. 179; *Havemeyer v. Superior Court*,

84 Cal. 327, 18 Am. St. Rep. 192, 24 Pac. 121, 10 L. R. A. 627; *Brooks v. Warren*, 5 Utah, 89, 12 Pac. 659.

⁹¹ *Le Conte v. Town of Berkeley*, 57 Cal. 269.

⁹² *Hobart v. Tillson*, 66 Cal. 210, 5 Pac. 83.

⁹³ *City of Coronado v. San Diego*, 97 Cal. 440, 32 Pac. 518.

⁹⁴ *Buckner v. Veuve*, 63 Cal. 304.

⁹⁵ *Spring Valley Water Works v. Bartlett*, 63 Cal. 245.

⁹⁶ *Gibson v. Superior Court*, 139 Cal. 4, 72 Pac. 348.

⁹⁷ *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

courts in such cases.⁹⁸ After the property of the insolvent has been sold by the assignee there is no office for the writ of prohibition to perform in reference thereto.⁹⁹ The fact that a writ of replevin issued by a justice of the peace is returnable on Sunday, or that the proceedings in such action involve the title to real estate, or that the plaintiffs therein and the officers making the levy were trespassers, are not grounds for the issue of a writ of prohibition to restrain such proceedings.¹⁰⁰

§ 7133. **Prohibition—Rehearing.**—A petition for a rehearing, and not a motion for a new trial, is the proper remedy for one desiring a rehearing of an original petition in the supreme court for a writ of prohibition, after a decision has been rendered thereupon.¹⁰¹

FORMS IN PROHIBITION.

§ 7134. **Petition for writ of prohibition.**

Form No. 1895.

[Title of court to which the application is made.]

[VENUE.]

To the Hon. . . . , Judge of said Court, petitioner respectfully represents:

That, [etc., stating such facts as show the relator to be entitled to the writ and the relief demanded, including a demand made upon defendants to desist]; and that he makes this petition for the purpose of procuring a writ of prohibition to be issued out of this court to the said . . . and . . . , to prohibit and restrain them and each of them from [stating the acts to be prohibited]; that he has no other plain, speedy or adequate remedy either at law or in equity.

⁹⁸ State v. Jones, 2 Wash. 662, 26 Am. St. Rep. 897, 27 Pac. 452. As to issue of the writ in insolvency proceedings, see Hayne v. Justice's Court, 82 Cal. 284, 16 Am. St. Rep. 114, 23 Pac. 125; Goddard v. Superior Court, 90 Cal. 364, 27 Pac. 298; Haile v. Superior Court, 78 Cal. 418, 20 Pac. 878.

⁹⁹ Chinette v. Conklin, 105 Cal. 465, 38 Pac. 1107.

¹⁰⁰ Tapia v. Martinez, 4 N. Mex. 165 (329), 16 Pac. 272. But compare People v. Spiers, 4 Utah, 385, 10 Pac. 609, 11 Pac. 509.

¹⁰¹ Grangers' Bank v. San Francisco, 101 Cal. 198, 35 Pac. 642.

Wherefore, he prays for the issuance of such writ, and for such other and further relief as he may be entitled to.

[ADD VERIFICATION.]

[SIGNATURE.]

§ 7135. Notice of motion for writ.

Form No. 1896.

[TITLE.]

To C. D.:

Please take notice, that I will move the court at [etc.], on the . . . day of . . . , 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order that a writ of prohibition issue directed to [name the court or tribunal], and to . . . , the judge thereof, and . . . , commanding them to desist and refrain from any further proceedings in [state the suit or proceeding sought to be prohibited], or for such further or other relief as the court may see proper to grant; which motion will be based upon the affidavit of A. B. [and the record of said proceedings, designating all papers to be used], copies of which are herewith served.

Yours, etc.,

[DATE.]

B. D., Attorney for A. B.

§ 7136. Alternative writ of prohibition.

Form No. 1897.

[TITLE.]

The People of the State of California, to the . . . Court of . . . ,
and to . . . , greeting:

Whereas, A. B., by his verified petition filed in said court on the . . . day of . . . , 19.., represented to our said court, that [etc., stating generally the facts and proceedings complained of].

Nevertheless, you, the said court aforesaid, and the said . . . , well knowing the premises, yet contriving, as it is said, the said A. B. unjustly to aggrieve and oppress, have [stating grievances], in contempt of us, against the laws and customs of our said state, and to the manifest damage, prejudice, and grievance of him, the said A. B.

Wherefore, the said A. B. has prayed relief, and our writ of prohibition in that behalf.

We, therefore, being willing that the laws and customs of our said state should be observed, and that our citizens should in no

wise be oppressed, (1) do command you that you desist and refrain from any further proceedings in [stating the matter to be prohibited] (2) until the . . . day of . . . , 19.., and until the further order of this court thereon; and that you show cause before our said court, at the time last aforesaid, at the courtroom of this court, in . . . , why you should not be absolutely restrained and prohibited from any further proceedings in such suit or matter. And have you then and there this writ.

Let a copy of said petition of A. B. be served with this writ.

Witness, . . . , judge [or justice] of said court at . . . , the . . . day of . . . , 19..

[SEAL.]

M. W., Clerk.

§ 7137. Peremptory writ of prohibition.

Form No. 1898.

[Same as in preceding form No. 1897 to (2).]

And of this writ, and what you have done thereunder, make due return to this court on or before the . . . day of . . . , 19..

Witness, the Hon. . . . , judge of the superior court of the state of California, at the courthouse in the county of . . . , and the seal of said court, this . . . day of . . . , 19..

§ 7138. Return to alternative writ of prohibition.

Form No. 1899.

[The return to the alternative writ of prohibition may be in substantially the same form as the return to the alternative writ of *mandamus*, making such changes as are necessary; if the writ be also directed to the opposing party in an action, he should adopt the return of the court or judge as follows:]

The foregoing return is hereby adopted by the undersigned A. B., named in the writ of prohibition hereto annexed, and will be relied upon as a sufficient cause why said writ of prohibition should not be made absolute herein.

[DATE.]

A. B.

[The subsequent proceedings may be adapted from the forms for *mandamus* given in the last preceding chapter.]

§ 7139. Writ of prohibition absolute.

Form No. 1900.

[Proceed as in form No. 1897 to (1), and continue:]
and having tried the issues arising in said action and having
adjudged [state substance of judgment], do command you, that
you absolutely refrain from any further proceedings in the said
action [or name particular act to be refrained from].

Hereof fail not at your peril.

Witness, etc.

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